THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Purveyors South Africa Mine Services (Pty) Ltd v Commissioner for the South African Revenue Services (Pty) Ltd (135/2021) [2021] ZASCA 170 (7 December 2021)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing, with costs, an appeal against a decision of the Tax Court of South Africa, Pretoria (the high court).

The primary issue before the SCA was whether the Commissioner for South African Revenue Services (SARS) was correct in rejecting Purveyors' voluntary disclosure application for non-compliance with section 227 of the Tax Administration Act 28 of 2011 (the TAA), more specifically on the ground that it was not made voluntarily.

The appellant is Purveyors South Africa Mine Services (Pty) Ltd (Purveyors). On 12 January 2015, Purveyors entered into a dry lease agreement with Freeport Minerals Corporation, a company incorporated and tax resident in the United States of America (Freeport), in respect of an Embraer 135 LR Aircraft registered in the United States of America. The dry lease agreement allowed Purveyors to operate air charter services for the benefit of Tenke Fungurume Mining SARL (Tenke), a non-resident company that owns and operates a mine located in the Democratic Republic of Congo (the DRC).

Purveyors entered into an aircraft management agreement with Air Katanga, a company incorporated in the DRC, to provide air charter services for the benefit of Tenke. Based on the aircraft management agreement, Air Katanga serves as manager of the aircraft and is engaged in the business of managing, operating and maintaining the aircraft.

On 19 January 2015, Purveyors commenced with the provision of air charter services to Tenke under a usage agreement. The aircraft transports employees, sub-contractors, suppliers, and business guests from Johannesburg to Lubumbashi and Kinshasa in the DRC generally three times a week, namely on Mondays, Wednesdays and Fridays. Tenke pays a fee in United States dollars to Purveyors per flight hour in exchange for operating the aircraft on a monthly basis subject to an annual reconciliation of costs as per the terms of the usage agreement.

On 16 November 2016, Purveyors ceased to be a wholly owned subsidiary of Freeport by way of a disposal of its entire issued share capital by Freeport to CMOC DRC Limited, which is a company incorporated and tax registered in Hong Kong. CMOC DRC Limited is affiliated with a sister company named CMOC Mining USA Limited (CMOC USA). CMOC USA is a company incorporated and tax resident in the United States. The initial dry lease agreement was subsequently assumed by CMOC USA and a new dry lease agreement (the agreement) was concluded. All other agreements, including the usage agreement and the aircraft management remain in effect between Purveyors and Tenke and other service providers.

On 30 January 2017, Purveyors requested, via e-mail, a meeting with SARS 'to regularize the VAT that was supposed to be paid over.' In the e-mail, Purveyors informed SARS that: 'We have just received a

VAT technical opinion from PwC that we were supposed to pay the VAT over to SARS upon the import of the aircraft'. On the 1 February 2017, SARS responded in an e-mail from Mr Johannes Du Preez in which he indicated that the aircraft was subject to penalty implications. He also requested to see documentation in terms of section 101 of the Customs and Excise Act 91 of 1964. Purveyor's, through Mr Thakgudi, acknowledged receipt of Mr Du Preez's email and indicated that he would revert as soon as possible with the requested information. On 29 March 2017, Mr Du Preez wrote to Purveyors explaining the reasons why VAT and penalties were payable. Mr Du Preez further indicated that Purveyors needed to appoint a clearing agent to assist it with an import permit to regularise its continued default. Purveyors responded on the same day, indicating that it understood from Mr Du Preez's e-mail and from their telephone discussion that VAT output and custom duties were applicable, as well as fines and penalties.

Mr Du Preez responded in an e-mail dated 30 March 2017, in which he sought to clear any misunderstanding and indicated that there existed no waiver of potential penalties, and that if the tax to SARS was late, Purveyors would be liable to pay penalties and interest. On 16 May 2017, Mr Du Preez wrote a further e-mail to Purveyors indicating that it had to address the matter as he had allowed Purveyors sufficient time to regularise its tax affairs. Purveyors responded and indicated that it was still awaiting a response from its head office. Purveyors approached its auditors, Price Waters Coopers (PwC), for an opinion as to whether it was liable to pay import VAT. PwC agreed with SARS that Purveyors was obliged to pay import VAT as well as penalties and interest. This was against the backdrop of PwC's earlier opinion, given in January 2017, advising Purveyors to honour its tax obligation in relation to its historical tax liability. Purveyors took no further steps to regularise its liability for VAT and penalties until 4 April 2018 when it applied for voluntary disclosure relief in terms of s 226 of the TAA. This was approximately a year after the last letter from Purveyors to SARS.

Relying on section 227 of the TAA, SARS rejected the application on the grounds that it was not voluntary; and did not contain the facts of which SARS was unaware as those facts had already been disclosed to it prior to the voluntary disclosure application. The Tax Court agreed with SARS and dismissed Purveyors' case. It found, *inter alia*, that the application was not voluntary as there was an element of compulsion on the part of Purveyors when it submitted the application. This further appeal by Purveyors is with the leave of the Tax Court.

The SCA held that the words 'voluntary' and 'disclosure' in the section of the Tax Administration Act 20 of 2011 require that the voluntary disclosure application must measure up fully to the requirements of the section. This appears from the textual interpretation of the section. The SCA held further that it is clear that the onus rests on the taxpayer to establish, on a balance of probabilities, that it has fully met the requirements of the section. The language used in the section clearly indicates the legislature's intention to arm the Commissioner with extensive powers to prevent taxpayers from disclosures which are neither voluntary nor complete in all material respects. The fact that the section provides that the disclosure application must be made in the prescribed form or manner rather than obtaining *ad hoc* advice from SARS is a clear indication that the mischief sought to be prevented is one where a taxpayer discloses information to SARS and later on makes a voluntary disclosure application.

The SCA held that applied to the present case, the facts show that from the outset – and well before the submission of its voluntary disclosure application – Purveyors knew that it was liable for the import VAT on the aircraft and penalties, which were not going to be waived.

Mathopo JA writing for the majority endorsed the opinion that the voluntary disclosure application must comply with the provisions of the section in all material respects. Moreover, that the taxpayer must take SARS into their confidence and voluntarily make a proper and frank disclosure which is neither prompted nor made as a result of any fear or compulsion. SARS must undoubtedly not be aware of the default. The Court was of the opinion that upon a true analysis of the facts of the present case, Purveyors' application does not pass the test. The application was not voluntarily made. Purveyors, in its application, did not disclose information of which SARS was unaware. The appeal was then dismissed with costs, including the costs of the two counsel.

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