REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

HELD AT KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 0059/2019

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

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SIGNATURE DATE

In the matter between:

MR A Appellant

and

COMMISSIONER FOR THE Respondent

SOUTH AFRICAN REVENUE SERVICE

J U D G M E N T

Olsen J

[1] According to the founding affidavit delivered in support of the notice of motion in this application, the taxpayer approaches this court under rule 56 of the rules promulgated under section 103 of the Tax Administration Act, 2011, for a final order in his favour in terms of section 129(2) of the Act. The order sought is that three assessments as to income tax issued by the respondent, the South African Revenue Service, be altered so as to reflect the upholding of the objections submitted by the taxpayer to each of those assessments.

[2] A brief history of the circumstances which brought the applicant to the tax court is necessary. It must of necessity be brief because this is one of those cases where the taxpayer has taken great care to be as frugal in his account of the facts as he could manage.

[3] A chronology of the barest essentials is as follows:

(a) On 9 March 2015 the taxpayer submitted his income tax returns for the tax years 2009, 2010 and 2011.

(b) On 8 May 2015 SARS issued additional assessments in respect of the taxpayer's liability for each of those three tax years.

(c) Just short of three years later, on 3 May 2018, the taxpayer submitted notices of objection in respect of each of the additional assessments.

(d) On 4 May 2018 SARS condoned the late submission of each of the objections. (There is a measure of confusion concerning such condonation. I will ignore it because, reading between the lines, it appears that an earlier objection may have been delivered, perhaps in 2016, the lateness of which was apparently not condoned. But the subject has not been properly canvassed in the papers before me.)

(e) On 14 May 2018 SARS delivered notices declaring the objections invalid, and furnishing the taxpayer with an opportunity to deliver new notices of objection within twenty (20) business days.

(f) On 11 or 12 June 2018 the period of twenty (20) business days expired without new notices of objection having been delivered.

(g) On 14 February 2019 the taxpayer delivered what purported to be a notice in terms of rule 56 calling upon SARS to deliver, within fifteen (15) days, a notice in terms of rule 8 requiring the taxpayer to produce additional substantiating documents, upon the footing that SARS had no power to "simply invalidate" the objections delivered in May 2018 without first calling for documents in terms of rule 8. The letter threatened that the present application would be launched if SARS did not give way and in effect reopen the matter by calling for documents in terms of rule 8.

(h) The notice of motion in the present application was dated 1 August 2019 and was presumably delivered shortly after that date. SARS delivered an answering affidavit on 20 January 2020, and a so-called replying affidavit, attested to not by the taxpayer but by his attorney, was delivered the day before the hearing of the present application, which took place on 12 October 2021.

[4] The first and obvious observation to be made with regard to this chronology is that, at best for him, the taxpayer is a serial procrastinator. Neither his notices of objection nor his papers in this application offer any explanation for any of the delays which are apparent from the chronology above.

[5] In each of the tax years in question the taxpayer was in receipt of travel allowances. Against those he sought to set off travelling expenses he allegedly incurred, limited to the amounts of the travel allowances. One sees from the assessments issued by SARS that in each year the taxpayer sought to claim travelling expenses incurred in the use of two motor vehicles. The same two vehicles feature in each of the tax years. A remarkable thing is that

(a) in each of the tax years each vehicle was claimed to have been used to the exclusion of the other for a fixed period in the tax year;

(b) if the opening and closing kilometre readings are accepted as correct then each vehicle was left unused by anyone at all, whether for business or otherwise, whilst the other vehicle was in use; and

(c) during the three years covered by the three returns this strange motoring pattern persisted.

The taxpayer has in not offered an explanation for this strange phenomenon.

[6] (a) In the 2009 tax year SARS allowed 4603 business kilometres out of the 64 664 kilometres claimed in respect of the vehicle which the taxpayer apparently used in November, December, January and February of the tax year in question. This figure (4603 kilometres) appears against the heading "business kilometres allowed".

(b) As to the other vehicle in respect of which 11 692 kilometres were claimed for the period March to October 2008, no business kilometres were allowed.

(c) As to both vehicles in both of the 2010 and 2011 assessments, one sees that no business kilometres were allowed by SARS.

(d) Save for minor medical aid adjustments about which there is no dispute, the additional assessments were the product of the way SARS treated the claim to allow travelling expenses against the travelling allowances furnished to the taxpayer.

[7] As will be seen from the chronology above, a matter of days before the absolute cut off point of three (3) years for the submission of an objection, the taxpayer submitted objections to each of the additional assessments complaining about the failure to allow alleged business travel expenses to be set off against travel allowances. However the complaint is a peculiar one. In essence the grounds of objection were the same in each case. Using the 2010 tax year as an example, the grounds of objection read as follows:

> "1. According to the additional assessment issued by SARS, the only adjustment made relates to the medical deductions. However, we noticed that SARS made a capturing/processing error where the business kilometres travelled were not correctly captured per the taxpayer's tax return.
>
> 2. Business kilometres per Vehicle 1 (per the ITA34) was correctly processed as 14 452 (travel expense: 14 452kms× R1.55 = R22,400.60), and Vehicle 2 was correctly processed as 44 452 (travel expense: 44 452kms × R2.74 = R121,798.48), but neither amounts were brought down to the final cost per kilometre calculation. The total travel expenses (source code 4014) is therefore R144,199.08, limited to actual travelling allowance received.
>
> 3. Please make the necessary corrections and issue a revised assessment accordingly."

[8] It is difficult to resist the conclusion that these notices of objection are disingenuous. Whatever the tax returns may have claimed (and those documents are not produced in this application), the assessments to which the objection speaks do not either "capture" or "process" business kilometres. What they record is the total kilometres said to have been travelled in each of the vehicles during the tax year in question, subtracting the opening odometer reading from the closing one. Save for the 4603 kilometres allowed as business travel in the 2009 assessment, adjacent to the heading "Business Kilometres Allowed" in all of the assessments one sees the figure zero. There was accordingly no occasion for an incorrect capture of business kilometres – no casting error – and no processing error. There is no explanation in the affidavits delivered by and on behalf of the applicant for how the assessments could have been misread in the way implied by the statement of grounds of objection.

[9] As the chronology above records, the taxpayer was notified that the objections were regarded as invalid on 14 May 2018, ten days after the objections had been delivered.

[10] In material part each of the notices of invalid objection reads as follows:

> "Insufficient or irrelevant substantiating documents provided to substantiate the grounds of dispute for source code 4014. Requirements of Rule 7 of the ADR Rules have not been met. The NOO is therefore invalid.
>
> A new NOO may be submitted within 20 business days from the date of this letter."

[11] Rule 7(2) deals with the requirements for a valid objection. One of them is that the objection must specify the documents required to substantiate the grounds of objection when such documents have not previously been delivered to SARS.

[12] Rule 8(1) then reads as follows:

> 'Within 30 days after delivery of an objection, SARS may require a taxpayer to produce the additional substantiating documents necessary to decide the objection.'

[13] With all the aforegoing in mind, the argument advanced in the founding affidavit proceeds as follows:

(a) Seeing that the decision that the notices of objection were invalid hinged around "insufficient or irrelevant substantiating documents", SARS was obliged to request the required documents in terms of rule 8.

(b) If SARS had done that the objections delivered on 3 May 2018 would have continued to subsist as such.

(c) The ruling by SARS that the objections were invalid without employing rule 8 brought about the demise of the objections, and there was nothing the taxpayer could do about that because the notices of invalid objections were delivered six days after the expiry of the three year period within which condonation of late delivery of an objection is possible. In the result the taxpayer was unable to lodge new objections.

(d) Accordingly, in February 2019, the taxpayer gave notice to SARS requiring it to cure its default by delivering notices in terms of rule 8 calling for the required substantiating documents, failing which an application would be made in terms of rule 56 for a final order upholding the objections in terms of section 129(2) of the Tax Administration Act.

(e) SARS failed to deliver the requisite notice and accordingly the relief claimed in this application must be granted.

[14] Counsel who appeared to argue the case for the applicant, conceded from the outset that the relief sought in the notice of motion could not be granted. The concession was indubitably correctly made. There are any number of reasons for that. Procedural and other legal issues aside, it is noteworthy that

(a) the applicant does not state on oath that he actually travelled the distances on business;

(b) the applicant has not stated on oath that he has documents which

(i) he would have produced had the notice in terms of rule 8 been delivered;

(ii) would have substantiated his claim to be allowed to set off business kilometres against his travel allowances;

(c) the ruling that the objections were invalid as a matter of fact did not bring about the demise of the objection process, as rule 7(5) provides that a taxpayer who receives such a notice of invalidity may within 20 days submit a new objection without having to apply to SARS for an extension of time under section 104(4) of the Tax Administration Act.

[15] The taxpayer has failed to explain why the right to submit a new notice of objection with sufficient and relevant substantiating documents was not exercised.

[16] Counsel for the taxpayer argued, however, that it was open to me on the papers to decide the question as to whether a request for further documents in terms of rule 8 was compulsory; and that if I should decide that question in the affirmative, to direct SARS to deliver a notice in terms of rule 8, and thereby bring about a reopening of the objections which were delivered on 3 May 2018. I am not certain that it is in fact open to this court to approach this application on that footing. I suspect that the affidavits would have been drawn somewhat differently if the court had been asked to make an order of the kind sought by counsel. However I need not consider that issue any further, given the view I take of the principle relied upon by counsel for the applicant/taxpayer, that, properly construed, a notice has to be delivered in terms of rule 8 before any decision is made by SARS concerning the validity of an objection.

[17] The argument made by counsel for the taxpayer is that where rule 8(1) stipulates that SARS "may" require a taxpayer to produce additional substantiating documents, the word "may" must be construed to convey a power coupled with a duty. In support of this argument I was referred to *Commissioner for Inland Revenue v I H B King*; *Commissioner for Inland Revenue v A H King* 1947 (2) SA 196 (A) at 209 to 210. In that case the Appellate Division had to consider and determine the meaning of section 90 of Act 31 of 1941. In its material part the provision read as follows:

> "Whenever the Commissioner is satisfied that any transaction or operation has been entered into or carried out for the purpose of avoiding liability for the payment of any tax imposed by this Act, or reducing the amount of any such tax, any liability for any such tax, and the amount thereof, may be determined, and the payment of the tax chargeable may be required and enforced, as if the transaction or operation had not been entered into or carried out: …"

In considering the meaning of the provision Watermeyer CJ referred to authorities dealing with factors which may have a bearing on understanding what the word "may" connotes in different contexts, but decided that the word "may" denoted a power conferred, and a duty to exercise it, in that section on this simple basis:

> "It could surely not have been the intention of the Legislature that the Commissioner should be given a discretion, when he has been satisfied that the transaction falls within sec. 90, in one case to say 'I will use my powers under this section' and yet in respect of another possibly identical transaction he should be able to say 'I will not use these powers'. To allow this will be to make it possible for discrimination to be exercised between different persons."

[18] No such considerations arise in this case. Neither, in my view, is the proper construction of rule 8 to be found taking into account an analysis of a perceived threat to constitutional rights which may, or are argued to be, affected by rule 8. (See *South African Police Service v Public Servants Association*, 2007 (3) SA 521 (CC) and *Saidi v Minister of Home Affairs* 2018 (4) SA 333 (CC) where the situations were different to the present one.)

[19] In construing rule 8, we are not dealing with a substantive provision which establishes or extinguishes rights. We are dealing with a provision designed to regulate procedure. The rule falls within Part D of the Rules headed “Reasons for Assessment, Objection, Appeal and Test Cases”. It is helpful to consider the use of the words “may” and “must” in the package of rules which take one up to an appeal (which is dealt with in rule 10), in order to contextualise the position occupied by rule 8, and to get a picture of the apparent intent behind the selection of one word or the other in a particular context.

[20] A precis of the relevant provisions, not intended to be all-encompassing nor to be perfectly accurate as to detail, would look like this:

(a) A taxpayer aggrieved by an assessment “may” prior to lodging an objection, request reasons for the assessment. (Rule 6(1).)

(b) A request for reasons “must” be made in the prescribed form and manner. (Rule 6(2).)

(c) If SARS is satisfied that reasons have in fact been provided it “must” within 30 days notify the taxpayer accordingly. (Rule 6(4).)

(d) Where SARS is satisfied that the taxpayer requires reasons SARS “must” provide the reasons within 45 days. (Rule 6(5).)

(e) A taxpayer “must” deliver a notice of objection within 30 days after certain fixed dates. (Rule 7(1).)

(f) A taxpayer objecting to an assessment “must” comply with certain requirements such as completing the form, specifying grounds of objection, and so on, and in particular dealing with the documents required to substantiate the grounds of objection. (Rule 7(2).)

(g) If the objection does not comply with rule 7(2) SARS “may” regard the objection as invalid, and if it does it “must” notify the taxpayer within 30 days of delivery of the invalid objection. (Rule 7(4).)

(h) A taxpayer in receipt of a notice of invalidity “may” within 20 days of delivery of the notice submit a new objection. (Rule 7(5).)

(i) Within 30 days of receipt of an objection SARS “may” require a taxpayer to produce “the additional substantiating documents necessary to decide the objection”. (Rule 8(1), the one in issue.)

(j) If so notified the taxpayer "must" deliver the documents within 30 days. (Rule 8(2).)

(k) SARS "must" notify a taxpayer of the decision on its objection within a fixed period (stipulated in Rule 9).

[21] In my view the above analysis illustrates that where in this package of rules the word "must" is employed, it is used to convey what is obligatory. Given that the provisions regulate the structure of the process (ie they are procedural in nature), the use of the word "must" indicates something to be done which is an essential part of the procedure. The word "may" is used more sparsely. In all the examples above it is used permissively. It is helpful to see, by way of example, the difference between the use of the word "may" in rule 6(3) and its use in rule 8(1). Rule 6(3) provides that SARS "may" extend the period for requesting reasons if it is satisfied that reasonable grounds exist. It is arguable, in the light of *Commissioner for Inland Revenue v IHB and AK King*, that the word "may" used in that context signifies a permissive power coupled with a duty to exercise it when the conditions for the exercise of it exist, that is to say when SARS is satisfied that there are reasonable grounds. Rule 8(1) is a quite different provision. There is no logical reason why the word "may" should be taken there to convey a duty, and not merely a right, to make the request. There are no stipulated conditions laid down for the exercise of the power. Given the structure of the rules referred to above, if it was intended that it be made compulsory for SARS to ask for documents, rule 8(1) would have been structured quite differently. It would have provided that if SARS is satisfied that additional substantiating documents are necessary to decide the objection, SARS must, within 30 days after delivery of the objection, require the taxpayer to produce those documents. That format, used elsewhere in the set of rules (as shown above), was deliberately not chosen for rule 8(1).

[22] In effect counsel for the taxpayer has asked that I hold that when any "additional substantiating documents" are necessary to decide an objection, it is a so-called "jurisdictional fact" for the exercise of the power either to overrule an objection or to declare it invalid, that SARS should require the taxpayer to produce such documents. One can only imagine the extent to which such a rule could be misused in order to delay matters and challenge decisions on objections, with technical arguments as to whether any documents fall to be classified as "additional substantiating documents necessary to decide" an objection. The true position is that it is the objector's duty to produce the documents or at the very least to specify them if the objection is to be valid or upheld. The rule in question simply furnishes SARS with the power to require the documents to be produced.

[23] For the aforegoing reasons I decline to make the order sought by counsel for the taxpayer.

[24] It is worth observing that if the construction of rule 8(1) contended for by the taxpayer were correct, it would have found no application in the current scenario. The rule deals with the subject of documents “necessary to decide the objection”. The objection in this case was, on each occasion, that SARS “made a capturing/processing error where the business kilometres travelled were not correctly captured for the taxpayer’s tax return”. No documents were needed in order to deal with that objection. There were no capturing or processing errors. Accordingly, if rule 8(1) had the meaning contended for by the taxpayer, there was no occasion for employing the rule.

I accordingly make the following order:

1. The application launched by Notice of Motion dated 1 August 2019 is dismissed with costs.

OLSEN J

Date of Hearing : Tuesday, 12 October 2021

Date of Judgment : Tuesday, 30 November 2021

(Electronically delivered)