IN THE SOUTH GAUTENG HIGH COURT
(JOHANNESBURG)

CASE NO: 2010/34417

DATE:22/02/2011

In the matter between:

PITRO ROSSI	First Applicant
ANTONIO PERA	Second Applicant
P AND R CONSTRUCTION CIVIL ENGINEERING CONTRACTORS	Third Applicant
And	
THE COMMISIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Respondent

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JUDGMENT – Final draft

SATCHWELL J:

Introduction

1. This is an application to compel the respondent to authorise the payment of a refund in terms of section 102 of the Income Tax Act 58 of 1962 ('the Act'). The Applicants further seek a declaratory order to the effect that the letter dated 19 October 1999 does not constitute an assessment.

2. Applicants' case is premised on the fact that there was no assessment in 1999

because that the documents submitted do not constitute an assessment as defined. Applicants maintain therefore that there was no legal basis for payments to be made. Hence the application for a refund in terms of Section 102 of the Act.

Factual Background

3. Third applicant provides civil engineering services for which they use sub-contractors who invoice third applicant for such services. An inspection by officers of the respondent during October 1999 resulted in an opinion that the third applicant was liable for payment of employee's tax in respect of these sub-contractors for the period 1 March 1998 – 28 February 1999 and 1 March 1999 – 28 February 2000 in the total sum of R467 390[1].

4. Negotiations took place between the third applicant and the respondent with no resolution. On receipt of a demand for payment in March 2007, the auditors of third applicant filed an objection in terms of section 81 of the Income Tax Act[2]. That objection was dismissed by the respondent on 2 July 2007 on the grounds that it had been filed after expiry of the three year period allowed for such objection[3].

5. Following further correspondence, third applicant made payments to respondent in May and October 2008. In March 2009, respondent, acting in terms of section 99 **of the Act**, attached monies in the first applicant's bank account.

Issues before this Court

6. The case which applicants have brought before this court (by way of application) are twofold:

[1] See annexure ….. and annexure….
[2] Annexure C
[3] See Annexure D which refers to section 81(2) of the Act

a. Firstly, applicants challenge the status of the disputed 'assessment' or extract therefrom on the basis of an averred failure to comply with the provisions of the Act. Both the letter dated 19th October 1999 [4] and an extract from respondent's computer[5] mare contested and respondent has had to concede it cannot now find the full original assessment.
b. Secondly, the very claim for tax itself is in dispute. Applicant maintains that it is not liable to deduct employee's tax in respect of the sub-contractors and, even if there was a valid assessment to this effect, such would be incorrect. As can be seen, the crux of the applicant's case is whether or not there were valid assessments.

7. Respondent takes the view that the 'extract' provided is "conclusive evidence of the making of such assessment, and…shall be conclusive evidence that the amount and all particulars of such assessment are correct". Respondent further submits that third applicant is presently in arrears in an amount of R 306 910.73 which precludes any refund to applicants.

8. In addition, there are a number of procedural and jurisdictional questions. I am most indebted to Advocate Molokomme, who appeared on behalf of the respondent, for his careful and informative Heads of Argument.

a. Firstly, respondent points out that applicants have taken 11 years to challenge the validity of the 1999 assessment and **have** provided no explanation for what is submitted to be an "inordinate delay". I am in agreement that there has been neither application for condonation nor provision of sufficient facts to justify any such condonation. It is trite that a reasonable explanation needs be offered and, in this particular case, the fiscus should be entitled to assume finality in collection of tax monies,

[4] See Annexure B
[5] See Annexure PO1 to the answering affidavit.

particularly where the Act sets out certain times frames which cannot be lightly ignored or rendered ineffective. [6]

b. Secondly, the 'assessment' in dispute took place on 20th October 1999 and this application was launched on nearly ten years later 3rd September 2010. Respondent submits that third applicant did not timeously object in terms of section 81 of the Act[7] which prescribes certain time periods for noting such objection. Accordingly, third applicant's right to object and/or appeal has lapsed[8]. In any event it is pointed out that respondent is prohibited from reducing an assessment after the expiry of three years from date thereof[9]. In the premises, respondent submits third applicant's right to object and/or appeal against the assessment has lapsed and the assessment has become final and conclusive[10].

c. Thirdly, applicants have attached a number of documents being invoices from various service providers alleged to be sub-contractors and not employees for purposes of determining the correctness of any assessment which might have been made. Without commenting on the absence of supporting affidavits as to the authenticity and veracity of these documents, I note that respondent has pointed out that there are a number of disputes of fact and that these are on material issues – i.e. whether or not there was ever an assessment (compliant with the Act), the status of the 'extract' submitted by respondent and the merits of applicants challenge to the basis of respondents claim for the taxes recovered. This

[6] See Van Wyk v Unitas Hospital and Another 2008 (2) SA 472 (CC)

[7] Section 81 of the Act read with the rules promulgated in terms of section 107A of the Act provides that "a tax payer who is aggrieved by an assessment may object to such an assessment in the manner and under the terms and within the period prescribed by the Act and the rules promulgated in terms of section 107A".

[8] Section 81(2)(b) provides that the prescribed period within which the tax payer ought to lodge an objection to an assessment and/or a revised assessment is a period of 3 years after which the period for objecting may not be extended (see section 81(5) of the Act)

[9] Section 79A(2) of the Act

[10] Section 81 (5) of the Act

motion court cannot decide these matters since the facts upon which applicants rely are not admitted by respondent[11].

9. I do not believe it necessary or appropriate for this court to discuss or determine either the merits or these other issues raised.

Jurisdiction

10. It is my view that this application can and should be decided on the issue of jurisdiction alone.

Objections to assessments and the Special Tax Court

11. The procedure in respect of assessments and objections thereto is contained in section 81 read with section 107A of the Act and part A of chapter III of the Act and the rules promulgated in terms of section 107A.[12] This procedure can be summarised as follows:-

    a. the commissioner makes an assessment;

    b. in terms of Rule 3, the commissioner must provide reasons for the assessment on demand unless he is of the opinion that adequate reasons have been provided;

    c. in terms of section 81(1) and Rule 4, the tax payer may object to the assessment;

    d. in terms of section 81(4) and Rule 5, the commissioner may allow or disallow the objections;

    e. in terms of section 83 of the Act and Rule 6, the tax payer may appeal

[11] See Plascon Evan Paints v Van Riebeck paints (Pty) Ltd 1984(3) SA 623 AD
[12] It is noted that the provisions of section 81(2) (b) only came into operation in 2003 and accordingly any three year period applicable to applicants would only commence on that date

against the disallowance of his or her objection;

f. if there is an appeal, the commissioner must give his grounds of assessment in terms of Rule 10; and

g. the tax payer must give his grounds of appeal in terms of Rule 11.

12. Once there is an assessment or purported assessment, the starting point for expression of dissatisfaction of any sort is to lodge an objection as provided for in terms of section 81. This the applicants did but their objection was disallowed on the grounds that it was lodged out of time.

13. Thereafter, applicants have not taken the decision of the respondent to disallow the objection on either objection or appeal as provided for in terms of the Act.

14. Finally, a dissatisfied taxpayer may appeal against such assessment to the tax court as provided for in terms of section 83. The applicants have not done or were precluded from doing by their failure to comply with the time periods.

15. I am, with respect, in agreement with what was stated in Van Zyl NO v The Master and Another 1991(1) SA 874 E at 877/878:

> "*The only way in which these assessments can be questioned is in the manner provided for in the Act, viz, by objecting to the Respondent in terms of Section 81 of the Act and then appealing to the Special Court in terms of Section 83 of the Act. The Act specifically prescribes that procedure and entrusts the determination of the amount owing to the Respondent and on appeal from his decision, to the Special Income Tax Court. If he was of the view that the document tendered was not an assessment issued by the Respondent at all or that there was some*

patent error in the calculation of the claim, ...the master could expunge the claim altogether or reduce it so as to reflect the amount assessed; But apart from such patent defects, the only way in which the validity of the amount claimed can be brought into question is in the manner provided for in the Act...it is not necessary to decide whether or not the assessments were correctly made. That is a matter for the Special Court to decide and I have no intention of usurping the functions of that Court (my underlying)."

16. Since applicants dispute the existence of any assessment and dispute that annexure PO1 is an 'extract' of or from an assessment as provided for in the Act, those issues and disputes become, in line with Van Zyl supra, a matter for the respondent to determine. Thereafter, the only way in which it is open to applicants to challenge the assessment or amount claimed "*is a matter for the Special Court*".

17. The Special Court constituted in terms of section 83 (4) of the Act[13], is a specialised court composed by the president who is a Judge of the High Court and two assessors, one of whom is an accountant and the other a commercial person. The benefits to the taxpayer of such a specialised Tax Court was expressed in Metcash Trading Ltd v Commissioner, SARS 2001 (1) SAS 1109 CC : "*...in any event, by the very referral of cases to that specialist tribunal, the Act can be seen to have designated an independent and impartial tribunal specifically tooled to deal with disputed tax cases...* (my underlining)." This motion court of the High Court is certainly not a court "*specifically tooled to deal with disputed tax cases*".

18. I am of the view that the reason why applicants approach this court and seek to claim a different jurisdiction in respect of applications for refund in terms of

[13] See section 83(1) of the Act

section 102 of the Act solely by reason of their failure to comply with time periods and the fact that they now perceive themselves to be beyond the reach of any other forum.

19. In any event, the order sought by applicants is not an interim order but is a final order. The Constitutional Court in Metcash supra found that the High Court has jurisdiction to adjudicate upon tax matters only in circumstances where the relief sought is of an interlocutory nature[14].

20. Furthermore, where the High Court does have jurisdiction to hear and determine income tax cases it would appear to be in respect of legal issues alone.[15] However, as to whether a matter for decision involves a matter of fact or a matter of law must be decided by the president of the Tax Court sitting alone[16].

Section 102

21. Section 102(1)(a) provides that any amount paid in respect of any assessment by any person shall be refundable to the extent that such amount paid exceeds the amount so assessed.

22. Applicants submit that an application for a refund, in terms of section 102, cannot be brought before the Tax Court because that court is a creature of statute which is only empowered to review the correctness of assessments on appeal in terms of section 83(1) of the Act. Accordingly, it was argued that the Tax Court is not clothed with the necessary jurisdiction to adjudicate upon applications under section 102 of the Act.

[14] At paragraph 45

[15] Friedman and Others NNO v CIR 1991 (2) SA 340 (W) where was stated "I am in agreement with the finding of the Court that where the dispute involved no question of fact and is simply one of law the Commissioner and the Special Court are not the only competent authorities to decide the issue- at any rate when a declaratory order such as that in the present case is being sought".

[16] Section 83 (4A) of the Act

23. Reliance was placed by applicants counsel on Estate H M Brownson v CIR and Others 6 SATC 166 to the effect that the Tax Court can only hear matters arising from assessments issued by the Commissioner.

24. Brownson supra provides no assistance because it is clear that the very issue in dispute and which applicants seek to bring before this court arises from an assessment. The purported application for refund does not exist in vacuo. The application for refund arises from and is premised upon the dispute concerning the assessment.

25. It was argued for applicants that, where a taxpayer has failed to timeously raise an objection to an assessment or has made an overpayment, "*he would ordinarily be in a hopeless position and without remedy – thus the reason for the enactment of section 102, in order to remedy such situation*". Support for such proposition was sought in Crown Mines Ltd v Commissioner for Inland Revenue AD 32 SATC 190 and Stroud Riley & Co Ltd v SIR 36 SATC 143 at 144.

26. The argument of applicant seems to be that section 102 was enacted solely to assist a taxpayer who has not availed itself of prescribed remedies or has been unsuccessful in the exercise thereof. In other words, it is suggested that section 102 offers an unhappy taxpayer a third or fourth bite at the fiscal cherry.

27. With this argument I cannot agree. Indeed, these judgments are not of assistance to applicants. Either counsel has misquoted from the judgments or not had regard to the facts and the issue before the court.

28. In Crown Mines supra, Innes CJ at page 195 did indeed write that the position of a taxpayer who overpaid and failed to lodge an objection under a mistake of law

would "*ordinarily be hopeless*". However, the learned Chief Justice went on to state "*whether such remedy (by way of condictio) would lie under similar circumstances in respect of an overpayment made under a mistake of fact is a point on which it is unnecessary to express an opinion*". (my insertion) Accordingly, the Appellate Division expressed no opinion as to whether a taxpayer could proceed where there was an overpayment made under a mistake of fact. It is not argued in the present case that any overpayment was made under mistake of fact. It is correct that the facts are in dispute in the present application as regards liability of the taxpayer but the overpayment was made because the respondent believed it to have made an assessment which had not been paid. In short, it would seem that applicants may well be viewed as taxpayers whose position the learned Chief Justice described "*hopeless*".

29. Stroud Riley supra was concerned with the manner in which the Secretary should exercise his discretion. It was held that no "assessment" had been made but only a receipt issued. In that case the SIR did not rely on what purported to be an extract from an assessment as is presently the case. Since no assessment had been made and the SIR was in agreement that there had been an overpayment, the powers of the Secretary conferred by section 102 of the Act had not been restricted by the passage of time subsequent to the payment of the tax. The judgment proceeds to set out the powers of the Secretary in such circumstances – "*the obvious intention of the legislature in enacting s 102(1) of the Act was to empower the Secretary to repay any amount of tax which he was satisfied in excess of the amount properly chargeable…. This general authority was not diminished by its restriction in certain cases by the provisions of ss (2) of that section. … the provision conferring such authority upon the Secretary imposed upon him a duty, when he was satisfied as required by the Act, to make the refund which it authorised him to make* (at page 151)".

30. These judgments are certainly not authority for applicants proposition that a taxpayer who has failed to follow the remedies set out in the Act[17] has available to it an additional and alternative forum, namely the High Court, which exercises concurrent jurisdiction with both the Tax Court and the Commissioner.

31. This led to the further submission on behalf of applicants that the jurisdiction of the High Court is never ousted in such matters and that it retains jurisdiction to entertain claims or give any order it would have been empowered to entertain or give at common law. I queried if this proposition meant that enactment of the Income Tax Act and the creation of the Special Tax Court simply meant that the procedures in the Act and the existence of the Tax Court were no more than parallel procedures and structures operating in tandem with the High Court who exercised concurrent jurisdiction with the Tax Court. The answer from applicants counsel was in the affirmative.

32. With this proposition I cannot agree. Firstly, it begs the question why the Legislature conceived of a Special Tax Court if every tax dispute could be brought in either that court or the High Court at the taxpayer's election. Secondly, it is inconceivable that the Legislature intended to create competing and concurrent fora for resolution of tax disputes with resulting confusion as to selection of forum. Thirdly, it would not be possible to establish any useful body of precedent for the benefit of both taxpayer and SARS if different fora developed different law on the same issues. Fourthly, the role of the High Court has already been identified in the Act – it is to provide a judge as a member of the specialised Tax Court to hear appeals and not matters of first instance. Fifth, our courts should be alert to the dangers of forum shopping.

33. In Metcash supra, the Constitutional Court endorsed these procedures I have

[17] Either by way of objection or appeal to the Commissioner.

outlined in paragraph outlined above , stating :-

"firstly section 31 constitutes a valuable weapon in the hands of the commissioner, but the compulsive force of this mechanism of the Act goes a good deal further. The dissatisfied vendor can, by lodging an objection under section 32 of the Act and, that failing, by noting an appeal under section 33, both compel the commissioner to reconsider the assessment and have its correctness reconsidered afresh by an independent tribunal (para 11)(my underlining)".

34. It seems clear that the Constitutional Court took the view that both objection and appeal are to be considered by the same tribunal - namely be the Income Tax Court constituted in terms of section 83 of the Act. It is therefore difficult to conceive why an applicant should argue a non specialist court would have concurrent jurisdiction.

35. The powers of the courts in applications for a refund are curtailed. As was stated in Crown Mines supra :

"The question whether there has been an excess payment or not has been left to the decision of the respondent and against this decision, there is no appeal.

"Speaking generally, assessment must precede payment; the obligation to pay only arises upon a due assessment; now it is at the assessment stage that questions of liability would ordinarily arise, and the legislature contemplated that at that stage they should be settled, elaborate provisions made for lodging objections to an assessment, for the settlement of disputes arising therefrom, and for an appeal in all questions of law;

The intention was to leave such a case in the hands of the Commissioner; he is empowered to authorise a refund, but only if it is

proved to his satisfaction that there has been a payment in excess of the amount properly chargeable. His judgment is to be the sole test."

36. Applicants chose not to utilise the "elaborate provisions" provided for in the Act. As was said in Crown Mines supra, it is the Commissioner in whose hands the authorisation of a refund is placed.

37. From that decision there appears to be no appeal. See also Crown Mines supra at page 100 in this regard where was stated "... taking *into consideration the provisions of appeal in case of objection to the assessment I should say that it was not intended by the Legislature that there should be an appeal under section 95*."

38. The end result would appear to be that the aggrieved taxpayer must proceed to challenge the assessment in terms whereof payment has been made or extracted. In this case, the taxpayer applicant had the opportunity to dispute whether or not the letter received or the demand made or the purported extract was an 'assessment'. That dispute should have been aired by way of objection and then by way of appeal to the Tax Court – and within the prescribed time periods.

39. The issues which the Applicants have brought before this Court are the issues for which the specialist tribunal referred to in Metcash was created.

Conclusion

40. I am of the view that this court does not exercise jurisdiction to decide this dispute. **This** dispute should have been pursued by way of an objection lodged with the Commissioner and thereafter appealed to the Special Tax Court which is the appropriate forum **for these matters**.

41. Accordingly, the application for orders in terms of prayers 1 to 6 of the notice of motion dated 1st September 2010 is dismissed with costs.

DATED AT JOHANNESBURG THIS 22nd DAY OF FEBRUARY 2011

K. SATCHWELL
Judge of the High Court

Date of hearing: