THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1156/2018

In the matter between:

BMW SOUTH AFRICA (PTY) LTD **APPELLANT**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *BMW South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service* (1156/18) [2019] ZASCA 107 (6 September 2019)

Coram: Navsa, Leach, Mbha, Van der Merwe and Nicholls JJA

Heard: 21 August 2019

Delivered: 6 September 2019

Summary: Payment by employer to tax consultants to render assistance to expatriate employees – whether a taxable 'benefit or advantage' as contemplated in the definition of 'gross income' in s 1 of the Income Tax Act 58 of 1962 read with s 2*(e)* or *(h)* of the Seventh Schedule.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Carelse, Molopa-Sethosa and Baqwa JJA sitting as court of appeal):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Navsa JA (Leach, Mbha, Van der Merwe and Nicholls JJA concurring.):

[1] BMW is a world-renowned German marque. The appellant, BMW South Africa (Pty) Ltd (BMWSA), is part of the BMW Group (the Group) that manufactures and markets BMW vehicles and conducts worldwide operations. It has a presence in numerous countries throughout the world. The question at the centre of this appeal is whether payments totalling R6 795 540 made by BMWSA to tax consulting firms KPMG, Price Waterhouse Coopers and Raffray Tax Consultants CC (the firms) in relation to services rendered to expatriate employees in respect of their domestic tax obligations, constitute a taxable benefit and consequently forms part of gross income in respect of which the employees are liable to taxation. Simply put, the question is whether the payments to the firms fall within the ambit of the definition of 'gross income' in s 1*(i)* of the Income Tax Act 58 of 1962 (the Act), read with paragraphs 2*(e)* or *(h)* of the Seventh Schedule thereto. The basis for BMWSA's adoption of tax liability on behalf of expatriate employees and why *it* is the appellant, will become clear in due course. The background is set out in the paragraphs that follow.

[2] As part of the Group's international business policy employees are required to work for short or medium term periods in locations where the Group has a presence, other than in their home countries. Such employees retain their connection with their

home countries and continue to submit tax returns there. Additional costs are incurred by the expatriate employees as a result of the Group requiring them to work in foreign countries. The employment relationship between the expatriate employees and the Group operates on an agreed 'tax equalisation' basis, which is standard in the Group. In simple terms, this means that the Group, wherever it has a presence, will ensure that the net income of their employees, in countries where they are placed, is no less than in their home countries. So, for example, if the marginal tax rate is higher in another jurisdiction, the Group will ensure that the impact is nullified by structuring remuneration in such a way that the employee is not worse off in terms of net remuneration.

[3] BMWSA, in order to facilitate tax compliance by their expatriate employees in South Africa, engaged the services of the firms to complete their registration as taxpayers. It also required them to assist expatriate employees with their tax returns as well as to deal with queries and objections to assessments in respect of the domestic tax regime. It is common cause that the reason for engaging their services is that the tax regime, insofar as it applies to expatriate employees, is fairly complex. I shall, later in this judgment, deal in some detail with the terms of engagement of the tax consulting firms and the evidence in relation thereto.

[4] In November 2009 the respondent, the South African Revenue Service (SARS), addressed a PAYE[1] letter of enquiry to BMWSA, in which it queried the payments made to the firms. SARS wanted to know why those payments did not constitute a taxable fringe benefit, in respect of which each expatriate employee would be liable. In SARS' view the payments to the tax consultants by BMWSA constituted such a benefit. BMWSA wrote back, denying that the payments constituted an advantage or a benefit. SARS was unmoved and issued an assessment for the tax years 2004 – 2009, on the basis that the payments to the firms referred to above were a taxable benefit in the hands of the employees in terms of the definition of 'gross income' in s 1*(i)* of the Act read with paras 2*(e)* and *(h)* of the Seventh Schedule. The tax due on

[1] PAYE stands for 'pay as you earn'. It is a withholding tax on income payments made by an employer to an employee. Amounts withheld are treated as advance payments of income tax due. In other words, an employer is obliged to deduct tax from the monthly remuneration of an employee and to pay it over to SARS.

the amount set out in para 1 above was calculated at a rate of 35 per cent and amounted to R2 378 407.72.

[5] BMWSA objected to the assessment from SARS. It disputed that the payments constituted a benefit or advantage that formed part of gross income. The relevant and rather extensive parts of the objection are reproduced hereunder:

'**The arrangement for expatriate employees**

. . . The following should be emphasised:

- *The secondments are not provided to employees as a "benefit or advantage" of employment. The employee is required to provide the relevant documentation to KPMG for tax return filing purposes, to protect the interests of BMW AG in the foreign country, and not to provide a private or domestic benefit to the employee.*

. . .

- Expatriate employees invariably remain residents in their home countries and will continue to submit tax returns in those countries. As such, they will need to continue incurring professional fees in their home countries to comply with local laws.
- The fact that the expatriate employee is required by BMW to serve in a foreign country results in additional costs that need to be incurred before the expatriate employee may legally serve BMW in that country. This includes work permits, visas and in this case, the correct filing of local tax returns.
- Since the expatriate employee is merely complying with the instructions of its employer (namely BMW (SA)) it is agreed that a so-called "tax equalisation" process will be applied which is standard practice within the BMW Group.
    - This means that the employee's effective rate of tax will be exactly the same as it would have been, had the employee remained in his/her home country (say Germany). The employees' packages are determined with reference to the home country net pay, and BMW agrees to take responsibility for the payment of tax in the host country (South Africa in this instance). All tax payments made are grossed-up for tax purposes to account for the fringe benefit created.
    - *In order to protect the interests of BMW AG and BMW (SA), KPMG is appointed to ensure that the South African taxes paid are not overstated or understated. The employee has no choice in this regard, and it is one of the conditions of his secondment agreement*.
    - It follows that the employee receives no benefit from the services provided by KPMG as he is in a financially neutral position, irrespective of whether the taxes

are overpaid or underpaid. The party benefiting from the KPMG services is BMW (SA) and not the employee.

- It should also be noted that a large component of the fee is directed towards providing assurance to BMW (SA) regarding its responsibilities in relation to the tax due by the employees, which is ultimately a company cost, and not the cost of the individuals. As such, the services are rendered to the employer and not the employee as certainty in relation to the correct disclosure of taxable income and tax paid, in these circumstances, is the responsibility of the employer and not the employee, contractually.

Conclusion

Based on the above, it is clear that:

- The services rendered by KPMG is to the "benefit or advantage" of BMW (SA) and not for the employee. As such it follows that par (i) of the definition of the gross income definition cannot be applied as no "benefit or advantage" is granted to the employee.
- The services are not for the expat's private or domestic purposes as it represents a bona fide business expense directly associated with the placement of the employee by BMW AG in South Africa. There is absolutely no "private or domestic" benefit to the employee.

. . .

We are not aware that SARS has ever attempted to tax such necessary payments and the practice generally prevailing appears to be to encourage employers to administer the local taxes to the benefit of SARS.

. . .

- We believe that we have illustrated above that the costs should not be taxable in terms of par 2(e) of the 7th Schedule.' (My emphasis.)

[6] SARS disallowed the objection. BMWSA, in turn, lodged an appeal against the assessment that was heard by Keightley J (with two assessors), sitting as the tax court. That court had regard to the provisions of s 1 of the Act, the relevant parts of which define gross income in relation to any year or period of assessment as follows:

'(i) . . .

(ii) in the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from a source within the Republic,

during such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts (whether of a capital nature or not) so received or accrued as are described hereunder, namely –

. . .

(i) the cash equivalent, as determined under the provisions of the Seventh Schedule, of the value during the year of assessment of any benefit or advantage granted in respect of employment or to the holder of any office, being a taxable benefit as defined in the said Schedule, and any amount required to be included in the taxpayer's income under section 8A[2] . . .' (Emphasis in judgment.)

[7] The tax court went on to consider the relevant paragraphs 2*(e)* and *(h)* of the Seventh Schedule which read as follows:

'(2) For the purposes of this Schedule and of paragraph (i) of the definition of "gross income" in section 1 of this Act a taxable benefit shall be deemed to have been granted by an employer to his employee in respect of the employee's employment with the employer, if as a benefit or advantage of or by virtue of such employment or as a reward for services rendered or to be rendered by the employee to the employer –

(e) any service . . . has at the expense of the employer been rendered to the employee (whether by the employer or by some other person), where that service has been utilised by the employee for his or her private or domestic purposes and no consideration has been given by the employee to the employer in respect of that service . . .; or . . .

(h) the employer has, whether directly or indirectly, paid any debt owing by the employee to any third person, . . . without requiring the employee to reimburse the employer for the amount paid or the employer has released the employee from an obligation to pay any debt owing by the employee to the employer, . . .' (Emphasis in judgment.)

[8] Against the aforesaid provisions the tax court was called upon to consider BWMSA's contentions. First, that the appellant's expatriate employees received no benefit or advantage, within the meaning of 'gross income' in s 1, through the appellant's payment of the tax consultants' fees. Accordingly, so BMWSA contended, the assessment raised by SARS in this regard must fail at the first hurdle.

[9] Second, that in the event the first submission did not find favour, the payment to the firms does not fall within the categories of taxable benefits identified in paragraphs 2*(e)* or *(h)* of the Seventh Schedule. In order to reach a decision the tax court had to have regard to the evidence tendered by BMWSA, namely that of Ms Du

[2] Section 8A in relation to the present dispute is inapplicable. It relates to gains made by directors of companies or by employees in respect of rights to acquire marketable securities.

Plessis, the payroll manager at BMWSA, and Ms Chambers, a director of KPMG. The relevant parts of their evidence are set out in the paragraphs that follow.

[10] Ms Du Plessis was responsible for paying the salaries of expatriate employees. She explained how tax equalisation in relation to those employees worked. It meant that an expatriate employee would not pay any more tax than required in their home country. In other words, the employee's take-home pay remained the same as it would have been had he or she not been seconded to work away from home. BMWSA undertook to pay the employee's tax in South Africa. The written agreement recorded that BMWSA would 'bear all salary costs'. It was an integral part of the employment agreement between BMWSA and its expatriate employees. Ms Du Plessis understood this to mean that BMWSA undertook to ensure that it would pay sufficient PAYE in respect of each expatriate employer.

[11] The following clause of the standard written employment agreement is relevant:
'During your international assignment you will be subject to taxation in your host country. By using the method of "Tax Equalisation" you will be treated as if you were still taxable in Germany. The calculation will be done on a yearly basis. The tax payable shall be calculated by an independent external tax consultancy entrusted with this task by BMW. The tax consultancy will also draw up your tax declaration in home and host country during your assignment.'

[12] According to Ms Du Plessis, an employee in terms of the contract of employment has no choice but to utilise the tax consultant. Significantly, she accepted that it remained, in terms of the domestic statutory tax regime, the responsibility of each employee to register for tax and to submit his or her tax returns. Simply put, in terms of the Act, the employee bore the tax obligation towards SARS. The consultancy services were rendered only to expatriate employees and not to South African residents employed by BMWSA. Ms Du Plessis explained that the tax consultancy services were necessary because the tax regime, as it applied to expatriate employees, was too complex for employees to navigate unaided.

[13] Ms Chambers from KPMG testified. She explained that BMWSA engaged the services of KPMG and stated that she regarded the company to be KPMG's client,

rather than each individual expatriate employee. BMWSA was charged a flat rate for the services rendered to individual employees. Any tax refunds due to an employee from SARS would be paid to BMWSA rather than to the employee.

[14] Ms Chambers described the services rendered to expatriate employees, which included registration and de-registration as a taxpayer, preparation and submission of annual income tax returns and a review of annual income tax assessments, the preparation of letters of objection to SARS on behalf of the expatriate employees and, if necessary, the submission of provisional tax returns.

[15] The tax court considered the primary question to be whether the expatriate employee received or accrued any benefit or advantage from the payment by BMWSA of the consultancy fees. It had regard to the submission on behalf of BMWSA that what fell to be considered was whether the expatriate employees were better off than had they remained in their home country and whether they received more of a financial benefit than had they not come to South Africa. That was the principal submission on behalf of BMWSA. It was contended that no advantage had been gained by the expatriate employee by virtue of the use of the consultancy services and the payment by BMWSA of their fees.

[16] The court went on to hold that it was a benefit that could be valued in money and fell within the definition of 'gross income' in s 1 of the Act. Alongside s 1 of the Act, the court considered the provisions of paragraph 2*(e)* of the Seventh Schedule. As regards paragraph 2*(e)* it noted that a benefit is taxable if it is in the form of a service rendered to the employee, at the expense of the employer and where the service was used for his or her private or domestic service. The court concluded as follows:

'Thus, if one has regard to the actual nature of the services rendered, it appears to me that they were for the employees' private use, i.e. to comply with the individual tax obligations of the employees vis-à-vis SARS.

. . .

Applying the principle to the present case, the question of whether tax consultancy services are for private use must be determined objectively. They are manifestly for the private use of locals. Consequently, and objectively, they remain so in respect of expatriate employees as well.'

[17] The tax court went on to say the following:

'I point out that the position of the individual taxpayers is not adversely affected nor is the contractual relationship ignored. The effect of the approach I have adopted is simply that the appellant will be required in terms of its contractual obligations to its expatriate employees, to shoulder the additional tax burden associated with the tax consultant's fees. However, this remains a private matter between the appellant and its expatriate employees.'

In the result the court dismissed the appeal by BMWSA and made no order as to costs.

[18] BMWSA appealed further, to the full court of the Gauteng Division of the High Court. The full court (Carelse, Molopa-Sethosa and Baqwa JJA) agreed with the conclusions of the tax court. The full court understood BMWSA's case to be that since there was no cash equivalent of the consultancy services included in the cash remuneration of the expatriate employees, no benefit or advantage as contemplated in s 1*(i)* of the Act was therefore received. The full court rejected the submission on behalf of BMWSA that expatriate employees were differently placed in relation to local employees because of the tax equalisation policy and that the consulting services therefore did not place them in a more advantageous position so as to bring them within the ambit of gaining a benefit or an advantage as contemplated in s 1*(i)* of the Act.

[19] The full court concluded that 'the expatriate employees received a benefit or advantage when the appellant paid the tax consultancy firms for tax services'. It went on to consider whether the benefit fell squarely within the ambit of para 2*(e)* of the Seventh Schedule. In this regard, it rejected BMWSA's contention that the consultancy services were not for the expatriate employees' private or domestic use. The full court found that there was no evidence that KPMG rendered any services to the Group. It made the following order:

'1. The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.'

It is against that order that the present appeal, with the leave of this court, is directed.

[20] Before us, BMWSA's case was that no causal link had been shown between the employment as contemplated in paragraph 2 of the Seventh Schedule and 'the

benefit, advantage or reward allegedly received by expatriate employees by reason of the services of the tax consultancy firms'. It was contended that the services of the firms were procured by BMWSA in pursuit of *its* tax equalisation policy. Thus, so it was submitted, the firms' services were, at least in part, rendered for the benefit of BMWSA, 'which utilised such services to ensure it paid the correct amounts of income tax, and deducted the correct amounts of employees' tax, on behalf of expatriate employees'. In this regard, D Davis *et al Juta's Income Tax*, Volume 3, Schedule 7, para 2-5 was relied on:

'The use must be wholly private or domestic – if used partially for the business or affairs of the employer, it falls outside this provision.'

[21] It is correct that the benefit or advantage contemplated in the definition of 'gross income' in s 1*(i)* of the Act must have been granted in respect of employment or to the holder of any office. As stated by D Clegg *Taxation of Employees* (2019), issue 68, para 2.2:

'This requirement forms the foundation for the transformation of a benefit or advantage into a taxable benefit or advantage.'

[22] A good starting point is the general engagement letter addressed by BMWSA to KPMG which, ostensibly, is the basis upon which all the tax consultants were employed. The letter of engagement commences as follows:

'**General Engagement Letter – Expatriate tax compliance and consulting services.**'

The introductory paragraph, at first blush, appears to indicate that KPMG will provide taxation and related services to BMWSA. It reads as follows:

'We wish to confirm the arrangements for KPMG Services (Pty) Limited ("KPMG") to provide the taxation and related services set out in this engagement letter to BMW South Africa (Pty) Ltd ("BMW SA").'

However, under the heading, 'Inbound Expatriates – Tax Compliance Services', the services to be provided by KPMG, alongside a flat fee per expatriate employee, are listed as follows:

- 'Registration/deregistration of expatriate employee as a taxpayer with the South African Revenue Service.
- Preparation and submission of annual income tax return and review of annual income tax assessment from SARS.

- Letter of objection to address any inaccuracies reflected on the assessment. These include section 79A requests for amendment of an assessment or lodging an objection where amounts have been erroneously included or omitted by SARS from the expatriate employee's IT34 assessment.
- Preparation and submission of provisional tax returns, if required.'

[23] Under the heading 'Outbound Expatriates – Tax Compliance Services', the services to be provided by KPMG, also alongside a flat fee per expatriate employee, are listed as follows:

- 'Exit meetings to be held at the Midrand offices of BMW SA or at the Johannesburg offices of KPMG, with the exception of meetings with executive level employees, which will be held at the offices of BMW SA at Rosslyn, if required.
- Preparation and submission of annual income tax return and review of annual income tax assessment from SARS.
- Letter of objection to address any inaccuracies reflected on the assessment. These include section 79A requests for amendment of an assessment or lodging an objection where amounts have been erroneously included or omitted by SARS from the expatriate employee's IT34 assessment.
- Preparation and submission of provisional tax returns, if required.'

Under the title 'Other Services', indicating a flat fee per expatriate employee, further services, such as an objection to incorrect assessments, are listed. All of the services set out in this and the preceding paragraph are in relation to the expatriate employees' tax obligations under our tax regime.

[24] The completion of the tax registration process and of an expatriate employee's tax returns are admittedly complex. The services rendered by the firms to expatriate employees, set out in paras 22 and 23 above, were to ensure that the latter met their obligations to SARS. It is undisputed that the amount set out in para 1 above, constitutes payments by BMWSA for the services rendered to the expatriate employees set out in paras 22 and 23. That payment was made in terms of the contract of employment. These were services that the expatriate employees would otherwise have had to pay for personally. The ineluctable conclusion is that the services provided are a benefit or advantage as contemplated by s 1 of the Act, read with paragraph 2*(e)* of the Seventh Schedule.

[25] That there might have been some peripheral advantage to BMWSA in that the tax returns of the expatriate employers and the results of the other services rendered to them could be utilised in checking the accuracy of their own calculation and otherwise utilising the data is irrelevant. The statement by Davis *et al* referred to in para 20 above on which BMWSA relied, is too strongly worded. There will be instances in which benefits or advantages contemplated within s 1(i) read with the Seventh Schedule have some residual or marginal advantage for an employer. The primary question however, is whether an advantage or benefit was granted by an employer to an employee and whether it was for the latter's private or domestic purposes. In the present case, as stated above, the compelling conclusion is that the services were correctly valued and utilised for the employees' private or domestic purposes as contemplated by s 1 of the Act read with para 2*(e)* of the Seventh Schedule.

[26] I agree with what the tax court said as set out in para 17 above, that the confirmation of the assessment will not lead to the expatriate employees being worse off in terms of their employment with BMWSA. In terms of their tax equalisation policy, they will have to bear the additional tax burden on behalf of the expatriate employees. BMWSA's policy and terms of employment cannot dictate the application of the provisions of the Act. The conclusions by the tax court and the court below confirming the assessment cannot be faulted.

[27] The following order is made.

The appeal is dismissed with costs, including the costs of two counsel.

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M S Navsa

Judge of Appeal

Appearances:

For Appellant:	P J J Marais SC (with him K J Burt)
	Instructed by:
	Macrobert Attorneys, Pretoria
	Claude Reid Inc., Bloemfontein
For Respondent:	L Sigogo (with him R Tsele)
	Instructed by:
	The Commissioner: SARS, Pretoria
	The State Attorney, Bloemfontein