SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY – JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal

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STATUS Immediate

Please note that the media summary is intended for the benefit of the media and does not form part of the judgment of the Supreme Court of Appeal.

BMW South Africa (Pty) Ltd v The Commissioner for the South African Revenue Service [2019] ZASCA 107

Today the Supreme Court of Appeal (SCA) dismissed the appeal by the appellant, BMW South Africa (Pty) Ltd, and held that payment by it to tax consultants to render assistance to its expatriate employees constituted a '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.

BMWSA appealed against an order of the full court of the Gauteng Division of the High Court Pretoria which upheld a decision by the tax court that found that the amounts paid to the tax consultants constituted a benefit or advantage in terms of the Income Tax Act.

The SCA rejected the argument that there was no link between the employment of the expatriate employees and the payment of the tax consultants' fees. It had been contended that the amount were paid by BMWSA in pursuit of its tax equalisation policy in terms of which it ensured that expatriate employees who were required to work in countries outside of their home base were not prejudiced in their net income. It was contended that the work done by the tax consultants in relation to the expatriate employees was utilised by BMWSA to ensure that it paid the correct amount of tax on the employees' behalf. That contention was rejected.

The SCA had regard to BMWSA's letter of engagement of the tax consultants and considered the nature of the services rendered. They included:

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

d. Preparation and submission of provisional tax returns, if required.3

The SCA concluded as follows:

'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.'

The following order was made:

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