IN THE TAX APPEAL COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

VAT Case number: 759

Date: 3 May 2013

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED
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DATE SIGNATURE

In the matter between:

AB CC Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

PRETORIUS J,

[1] This an appeal against the finding of an audit by the South African Revenue Service (SARS) during October 2003 in respect of the payment of value added tax (VAT) by the taxpayer (appellant).

[2] It was made abundantly clear by counsel for the appellant, during opening argument that this appeal is not to request the court to mitigate the penalties, additional tax and interest that the appellant had been requested to pay. The appeal is against the assessment itself. It is common cause that the assessment was done on a merger of two separate tax entities, AB CC and AB and Associates CC. The argument is thus that the capital amount on which the assessment had been done related to both entities, which were treated as one by SARS, which SARS conceded was done incorrectly. The arguements in court and the objections on ADR1 and ADR2 were never consistent and the taxpayer's arguments were not consistent with the objections on ADR1 and ADR2 in the rule 11 statement.

[3] During the October 2003 audit it was found by SARS that the taxpayer had under-declared and therefore underpaid VAT. Consequently SARS wrote to the taxpayer:

> *"The Vat 201 returns submitted for the periods 03/2002 to 09/2003 inclusive, have been revisisted to account for vat charged and not disclosed / declared on the appropriate Vat 201 returns. Additional tax equal to two hundred percent has been levied in terms of s60 of the Value Added Tax Act No. 89 of 1991 (herein referred to as the ACT)."*

[4] The taxpayer was invited to object to these revised assessments:

"Should you wish to lodge an objection, kindly do so in writing and clearly marked for the attention of the writer. The objection must be received within 30 days of receipt of this notice. ***You are obliged in terms of s 32 of the ACT to specify in detail the grounds for the objection****"* (Court's emphasis)

[5] The result of the assessment was that the taxpayer owed SARS R4 040 337.28. The undeclared output tax was R1 246 177.57 (the capital amount). In terms of section 60 of the VAT Act additional tax was levied in the amount of R2 492 355.06 In terms of section 39(1)(a)(i) of the VAT Act R124 617.75 was levied as a penalty and R177 226.90 interest was levied on the capital amount in terms of section 39(1)(a)(ii) of the VAT Act.

[6] Mr. X, the sole member of the taxpayer, raised an objection to SARS on the prescribed form, ADR1. Mr. X objected against the income tax and the VAT. He marked his grounds of objection on the form as:

"Processing-related objections

X ***Penalty for underestimation of provisional tax must be remitted.***

X ***Interest on underpayment of provisional tax must be remitted***

X I do not agree with a notice/decision issued by SARS which in terms of legislation, is subject to objection on appeal

X Other (please elaborate). Refer to attachments"

and:

> *"X Additional tax in the amount of R2492355.70 imposed must* ***be remitted*** *to an amount of R_____*
>
> *X Interest in the amount of R177 266.90* ***imposed must be remitted.****"*

[7] Mr. X further described the grounds of objection as:

> *"1. Unfair application of procedural matters by SARS Special Investigations.*
>
> *2. Excessive add tax of 200% plus penalties and interest charges.*
>
> *3. Interference of SARS Special Investigation officer into the affairs of the businesses including AB & Associates without any form of negotiations or consultations.*
>
> *4. Reparations of damages caused by SARS interference and actions in the said businesses in order to put things right.*
>
> *5. SARS contraventions of its own SARS CHARTER and SARS SSMO and Dispute Resolution processes."*

[8] In the letter attached to his objection he, *inter alia*, stated:

> "***Uncontested VAT Assessment value of R1 246 177.69*** *was presented to the said business on the 10th March 2004.*
>
> *We did not contest this decision though the businesses have been*

denied adequate resources for re-establishing meaning operations." (Court's emphasis)

[9] Nowhere was it mentioned by Mr. X that the taxpayer objected that there was a merger between the two entities by SARS and the capital amount and the assessment were incorrectly calculated as the two entities were handled as one. In both the original objection and the appeal the objection was against the additional tax, the interest and the penalties. The objections were in relation to remittance of these figures. The first time it was declared by the taxpayer that the assessment was null and void and should be cancelled was in the Rule 11 statement by the appellant, which was dated 15 March 2011. This is a period of seven years after the confirmation by Dr Y of the assessment in relation to the turnover figures and four years after the notice of appeal ADR2 was filed on 22 January 2007.

[10] As early as 28 July 2004 SARS confirmed to Mr. X that according to him there was thus no objection raised to the quantum of the additional VAT output. This contention was confirmed by Dr Y, a chartered accountant employed by the taxpayer, on 7 October 2004 when he wrote on behalf of the taxpayer:

"Refer to our meeting of yesterday morning and the various discussions that had taken place.

The combined assessments of AB CC and AB & Associates will be separated and individual assessments will be raised.

I would like to note we are in agreement with your turnover figures.

The difference between your figures and those of the VAT returns relate to different methods of accounting for VAT liabilities." (Court's emphasis)

[11] The notice of appeal (ADR2) was filed by the taxpayer on 22 January 2007 which set out:

"1. Unfair imposition of 200% additional tax;

2. Unfair imposition and incorrect penalty;

3. Unfair imposition and incorrect interest charge;

4. Unfair tax procedure matters. "

[12] Again there is no mention that the taxpayer is appealing the method at which the capital amount was determined by SARS or the amount of the capital amount on which the assessment was based. This lead to SARS stating in the grounds of assessment in terms of rule 10 of the tax rules:

"When the objection (Notice of Objection and the letter of the grounds of Objection) and appeal (Notice of Appeal and the letter of the grounds of Appeal), it is clear that the Appellant does not dispute liability for the capital amount.

The only amounts of the assessment that the Appellant objected to and appealed against were the levying of additional tax at 200%, interest and penalty." (Court's emphasis)

[13] Mr. X's evidence on behalf of the taxpayer in court was that he had agreed with the capital amount throughout as he had no choice. According to him he agreed that the capital amount was correct so that SARS would unlock the bank accounts of the taxpayer and that of AB and Associates. This was never mentioned in his first objection, ADR1, nor in his appeal, ADR2. Furthermore there was no mention in Dr Y's letter that the capital amount was in dispute and that the taxpayer had only agreed to the correctness of the capital amount to have the bank accounts unblocked. His evidence was quite clear that he was not requesting a remission on penalties, additional tax or penalties, but that the whole assesment should be declared null and void and set aside due to the pressure SARS placed on him to admit the capital amount in order to unblock the bank accounts. The rule 11 statement by the taxpayer dealt with this assessment of the capital amount for the first time. This was the first time SARS became aware that the capital amount is in dispute, as up to that time there had been no indication that the taxpayer was contesting the capital amount and consequently the assessment.

[14] Accordingly, these were the only objections dealt with in the rule 10 statement. As a result of an agreement between the parties a preliminary point was argued in the tax court:

> *"Whether or not the Appellant objected to the capital portion (i.e. dispute amount minus additional tax, penalties and interest) in its Notice of Objection (ADR 1 form) read with the letter of Grounds of Objection attached to the Notice of Objection. (If the Court finds that the Appellant did not object to the amount, the Appellant will be entitled to raise the capital amount as an issue on trial, without leave to amend. Conversely, if the Court finds that the Appellant objected to the capital amount, the Appellant will be entitled to raise the capital amount as an issue on trial)."*

[15] The Tax Court decided against the taxpayer. On appeal to the Supreme Court of Appeal this decision by the Tax Court was confirmed.

[16] In **Matla Coal Ltd v Commissioner for Inland Revenue 1987 (1) SA 108 (A)** Corbett JA held at 125 C – J:

> *"And in terms of s 83(7)(b) the appellant in an appeal against the* ***disallowance of his objection is limited to the grounds stated in his notice of objection.*** *This limitation is for the benefit of the Commissioner and may be waived by him (see Commissioner for Inland Revenue v George Forest Timber Co Ltd 1924 AD 516 at 521)."*

and:

> ***"It is naturally important that the provisions of s 83(7)(b) be adhered to, for otherwise the Commissioner may be prejudiced by an appellant shifting the grounds of his objection to the assessment in issue.*** *At the same time I do not think that in interpreting and applying s 83(7)(b) the Court should be unduly technical or rigid in its approach. It should look at the substance of the objection and the issue as to whether it covers the point which the appellant wishes to advance on appeal must be adjudged on the particular facts of the case."* (Court's emphasis)

[17] The question has to be decided whether the objection by the taxpayer is limited to his objections as set out in ADR 1 and ADR 2. In the **Commissioner, South African Revenue Service v Brummeria Renaissance 2007 (6) SA 601 (SCA)** at paragraph 26 Cloete JA held:

> ***"It seems to me that these competing contentions must be resolved by having regard to the purpose underlying ss 79(1) and 81(5), which is obviously to achieve finality.*** *To uphold either of the Commissioner's contentions would undermine that purpose. It is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end - interest* reipublicae ut sit finis litium*; and it would be unfair to an honest taxpayer if the Commissioner were*

to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right - memories fade; witnesses become unavailable; documents are lost. That is why s 79(1) seeks to achieve a balance: it allows the Commissioner three years to collect the tax, which the Legislature regarded as a fair period of time; but it does not protect a taxpayer guilty of fraud, misrepresentation or non-disclosure. If either of the Commissioner's arguments were to be upheld, this balance would be unfairly tilted against the honest taxpayer." (Court's emphasis)

[18] These authorities make it quite clear that the provisions of the Act must be interpreted in such a manner that finality in a dispute must be reached. It should apply to the taxpayer as well and the taxpayer cannot shift the goalposts at each new hearing, but must adhere to the grounds of objection as set out in the original objection (ADR1) and the appeal against the finidng (ADR2).

[19] It is quite clear that the taxpayer is arguing that the tax court must revisit the question whether the capital amount which the assessment was based on, was correct. In the rule 11 statement it challenged the assessment and argued that it should be struck down as null and void. It alleged in the alternative:

"That, which SARS relies on as an 'assessment' is corrupted also by the unlawful, invalid and groundless infiltration into the

VAT affairs of the Appellant, the separate affairs and business transactions of a legally separate entity; AB & Associates CC "

Rule 6(3)(a) provides:

"(3) In the taxpayer's notice of appeal in terms of subrule (2), he or she-

must indicate in respect of which of the grounds specified in his or her objections in terms of rule 4 he or she is appealing;"

[20] It is quite clear that the taxpayer was not appealing the capital amount as it seems from all the information on ADR1 and ADR2, as well as the letter written by Dr Y, on behalf of the taxpayer, that the capital amount was never in dispute.

[21] This court finds it in the position, where it is emphasized by counsel for the taxpayer that it is not asking for remission of the penalties and interest, but that the court must find that the "fusion" of the two entities caused the assessment on the capital amount to be incorrect. This flies in the face of the finding by the Supreme Court of Appeal where Ponnan JA found in this matter:

"It remains to add that in terms of s 32(5) of the VAT Act as no objection had been lodge against SARS' assessment that the taxpayer was liable to SARS for additional VAT output tax in the sum of R1 246 177.60, that assessment became final and

conclusive in April 2007. **And as a period of three years has elapsed (s 31A), the taxpayer cannot now lawfully require SARS to revisit its assessment even if it was wrong to have included the turnover of a related entity in calculating the taxpayer's VAT liability.**" (Court emphasis)

[22] It is clear from this decision by the Supreme Court of Appeal that this court cannot order SARS to revisit the assessment. This court cannot come to a decision which is contrary to what the Supreme Court of Appeal had already decided.

[23] Although counsel for SARS argued against any remissions for liability for penalties, interest and additional tax, counsel for the taxpayer made it quite clear that the taxpayer was not relying on sections 39 and 60 of the VAT Act. The taxpayer was not seeking remissions of any of the amounts and denounced any reliance on sections 39 and 60 of the VAT Act. The arguments by counsel for SARS were thus not applicable on the clear indication by the taxpayer that no remission was requested.

[24] The taxpayer's case was that the assessments were invalid and therefor no penalties, interest or additional tax are owed to SARS.

[25] The court was referred to Section 33(3) of the Act which provides:

> *"(3) At the hearing by the tax court of any appeal to that court, the tax court may inquire into and consider the matter before it and may confirm, cancel or vary any decision, direction or supplementary direction of the Commissioner under appeal or make any other decision, direction or supplementary direction which the Commissioner was empowered to make at the time the Commissioner made the decision, direction or supplementary direction under appeal or, in the case of any assessment order that assessment to be altered or confirm the assessment or, if it thinks fit, refer such matter back to the Commissioner for further investigation and reconsideration in the light of principles laid down by the court."*

[26] The taxpayer requested the Court to declare the assessment null and void. Section 33 (3) provides for the court to confirm or alter the assessment, or to refer the matter back to the Commissioner. In this instance, where a new ground of objection was raised in the rule 11 declaration, which has no bearing on the objections in ADR1 and ADR2 and which the Supreme Court of Appeal had already ruled on, this court cannot refer the matter back to the Commissioner. The court finds in these circumstances that the provisions of section 33 (3) of the Act do not apply.

[27] As the tax court is a creature of statute it does not have the same inherent powers that a High Court has. It is immaterial how AB and Associate's business was structured, as the taxpayer had admitted from the outset that the capital amount was correct. This was confirmed by the Supreme Court of Appeal.

[28] Therefore this court cannot declare the assessment invalid, as it was never contested in the objections by the taxpayer. It was mentioned for the first time in the rule 11 statement and for the same reasons that the Supreme Court of Appeal had decided against the taxpayer, this court has no option but to do the same. It was conceded in the Supreme Court of Appeal's judgment that even in the event that SARS was wrong to include the turnover of AB and Associates it is too late to revisit the assessment as it became final and conclusive in April 2007. Therefore the appeal has to fail

[29] The order is:

The appeal is dismissed with costs.

_____

C Pretorius

Judge of the High Court

I agree,

_____

Mr T Matshisevhe

I agree,

_____

Mr Z Mabhoza

VAT Case number	: 759
Heard on	: 25 March 2013
For the Appellant	: Adv BG Savvas
Instructed by	: Venn & Muller
For the Respondent	: Adv N Nxumalo
	: Adv Killian
Instructed by	: The Commissioner - SARS
Date of Judgment	: 3 May 2013