IN THE TAX COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

Case No.: IT14027

Date Heard: 21 November 2016

Date Delivered: 7 December 2016

In the matter between:

ABC (PTY) LTD Appellant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICES Respondent

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JUDGMENT

EKSTEEN J:

[1] The appellant company is a provisional taxpayer in terms of the Income Tax Act, 58 of 1962 (the IT Act). It delivered its return for payment of provisional tax for the 2010 year of assessment on 30 June 2011. In this return it estimated its taxable income for the year of assessment and made payment of provisional tax in accordance with the estimate. Sometime after the end of the tax year it transpired that the actual income received exceeded the estimate very substantially. The South African Revenue Services (SARS) accordingly imposed an underestimation penalty in terms of the IT Act.

[2] An objection followed which was rejected. The rejection prompted an appeal which was decided in favour of the appellant by the Tax Board. SARS thereafter referred the appeal to this court for a hearing *de novo* and duly filed its statement of

grounds of assessment and opposing the appeal pursuant to Rule 31 of the Tax Court Rules. In response the appellant filed a statement of its grounds of appeal pursuant to Rule 32 of the Tax Court Rules. In its grounds of appeal the appellant abandoned all the grounds raised in its original objection and in its notice of appeal. It sought now to rely only on a procedural ground raised *mero motu* by the chairperson of the Tax Board upon which he found in favour of the appellant.

[3] SARS filed a notice of exception contending that in law the appellant may not now, at a hearing *de novo*, rely on a new ground of objection not contained in its grounds of objection. This the appellant appears to acknowledge and accordingly it filed an application for the amendment of its grounds of objection. It is the exception and the proposed amendment of the grounds of objection which form the subject of the present proceedings.

Background

[4] As set out earlier the appellant submitted its return for payment of provisional tax on 30 June 2011. It estimated its income for the year of assessment in an amount of R431 638,00 and made payment in the amount of R64 905,54 in accordance with the estimation. On 30 September 2011 the appellant made a further payment of R1 377 466,22. This was followed by a return of income filed on 8 October 2011 in which the appellant disclosed a taxable income for the year of assessment in the amount of R5 050 076,00.

[5] In terms of Article 20(1) of the Fourth Schedule of the IT Act if the actual taxable income of a provisional tax payer, as finally determined under the IT Act,

exceeds R1 million and the estimate made in the return for payment of provisional tax is less than 80% of the amount of the actual taxable income the commissioner is obliged to impose a penalty, which is deemed to be a percentage based penalty imposed under Chapter 15 of the Tax Administration Act, 28 of 2011 (the TA Act).

[6] In view of the discrepancy between the estimated earnings in the return for payment of provisional tax and the return of income SARS imposed an underestimation penalty in terms of the IT Act. The actual penalty assessment is not included in the papers before me, however, it appears from the ruling of the Tax Board, which has been placed before me, that the assessment occurred 1 November 2011.

[7] The appellant lodged its notice of objection against the imposition of the penalty on 18 May 2012 and requested that the underestimation penalty be waived. The grounds of the objection were formulated as follows:

> "THE IMPOSITION OF PENALTIES FOR UNDERESTIMATION OF PROVISIONAL TAX IS UNNECESSARY (*sic)* PUNITIVE IN RESPECT OF TAXPAYERS WHERE TAXABLE INCOME EXCEEDS R1M. A TAXPAYER CANNOT REASONABLY BE EXCEPTED TO MAKE AN ACCURATE ESTIMATE OF TAXABLE INCOME BEFORE THE FINANCIAL STATEMENTS HAVE BEEN FINALISED. FINANCIAL STATEMENTS ARE ONLY PREPARED AFTER THE FINANCIAL YEAR END. THE WORLD ECONOMY IS IN A STATE OF TURMOIL WHICH ADDS TO THE UNCERTAINTY OF LOCAL TRADING CONDITIONS."

[8] The objection was duly considered by SARS and on 4 June 2012 it was rejected. The ground for rejecting the objection was that the respondent considered that no serious calculation of the taxable income was done with due regard to the factors having a bearing thereon. This prompted the notice of appeal against the

decision to disallow the objection. The notice of appeal was lodged on 4 July 2012 and the reason and grounds for the dispute were stated as follows:

> "THE 2010 TAXABLE INCOME WAS SUBSTANTIALLY HIGHER THAN THAT OF PRIOR YEARS. THIS WAS AS A RESULT OF THE REDUCTION OF FINANCE CHARGES AS AN INTEREST FREE LOAN SUBSTITUTED THE INTEREST BEARING LOANS. IT WAS ONLY DECIDED AFTER YEAR-END NOT TO CHARGE INTEREST ON THIS SHAREHOLDER LOAN WHICH INCREASED THE TAXABLE INCOME. THE TAXPAYER DID NOT INTENTIONALLY UNDERESTIMATE THE TAXABLE INCOME, BUT MADE THE BEST POSSIBLE ESTIMATE WITH THE INFORMATION AVAILABLE. KINDLY WAIVE THE PENALTIES."

[9] I pause to record that at the time of the rejection of the objection and at the time of the lodging of the notice of appeal the TA Act had not yet come into effect. The issue in dispute in the appeal was therefore whether the respondent was correct in his decision not to remit the penalty imposed for the under-estimation of taxable income on the ground that no serious calculation of income had been done.

[10] The appeal came before the Tax Board on 14 May 2015 and the Tax Board ruled that the commissioner was indeed correct in rejecting the objection stating that it would be inclined to dismiss the appeal on its merits. The chairperson of the Tax Board, however, *mero motu* raised a procedural issue under the TA Act which, in the interim, had come into force. The chairperson of the Tax Board had before him a notice of assessment dated 7 February 2013. In terms of this notice the assessed income for the 2010 financial year was reduced and accordingly the percentage based penalty was also reduced, now to an amount of R197 358,33. The notice of reduced assessment stipulated the "due date" in respect of the penalty to be 1 November 2011 being the original date of the imposition of the penalty. This the

chairperson of the Tax Board considered to be in conflict with Part D of Chapter 15 and in particular section 214 and 215 of the TA Act and accordingly held that the reduced under estimation penalty is legally unenforceable by reason of the non-compliance by SARS with the requirements of the TA Act. I shall revert to this issue below.

The exception

[11] At the hearing before me Mr ***X*** SC, on behalf of the appellant, acknowledged that in the absence of an amendment to the grounds of objection the appellant was precluded from relying on new grounds not raised in the grounds of objection and accordingly that the exception, on the papers as they currently stand, is unassailable. (Compare ***HR Computek (Pty) Ltd v Commissioner for South African Revenue Services*** [2012] ZASCA 178 (29 November 2012) para [12]; and Rule 32(3) of the Tax Court Rules.)

[12] It was accordingly common cause that the exception should be upheld unless the application for an amendment is granted.

The application for amendment

[13] The notice of motion in the application for leave to amend the grounds of objection records:

> "1. The Appellant herein will seek leave to amend and amplify its grounds of objection to the disputed assessment;"

[14] The notice of motion gives no indication in terms of which rules or statutory provisions the application proceeds and the content of the proposed amendment is not formulated either in the notice of motion or in the supporting affidavit. In the supporting affidavit the deponent, who is a director of the appellant, confirms that the appellant pursues the dispute between itself and the respondent solely on the procedural basis raised by the chairperson of the Tax Board. He refers to the statement of grounds of appeal and confirms that those constitute the grounds upon which the appellant seeks to rely. The grounds set out therein are as follows:

> "The Tax Board found:
>
> 11.1 That Part D of Chapter 15 of the TAA was indeed applicable to the Underestimation Penalty.
>
> 11.2 That the Respondent had failed to follow such procedure.
>
> 11.3 That accordingly the imposition of the Underestimation Penalty is legally unenforceable.
>
> 11.4 That the appeal should be upheld, on the procedural ground alone."

[15] It is common cause that the Tax Court Rules makes no provision for an amendment of the nature in issue. Rule 42 of the Tax Court Rules provides, however, that where the Rules do not provide for a procedure in the Tax Court, then the most appropriate rule under the Rules for the High Court may be utilised by a party or the Tax Court to the extent that it is consistent with the TA Act and the rules of the Tax Court. Where there is a dispute during an appeal concerning the use of a Rule of the High Court it must be dealt with by the President of the Tax Court as a matter of law in terms of section 118(3) of the TA Act. The appellant, acknowledging that the Tax Court Rules do not provide for an application to amend the grounds of objection seeks to rely on Rule 28 of the High Court Rules. As a general rule the High Court will not grant an amendment in terms of Rule 28 until it has been properly

formulated. The reasons therefore are that courts are averse to a procedure of granting leave to appeal within the limits laid down by an order, for the amendment when it is ultimately formulated may be found to be excipiable or may unduly restrict the applicant, or confer upon his amended pleading an immunity from exception that might work an injustice to the respondent. In the present matter the amendment is formulated by reference to a ruling by the Tax Board. The appeal, constitutes a hearing *de novo* and the proceedings before the Tax Court are irrelevant. Mr ***X*** recognised that the essence of the amendment upon which reliance is sought to be placed would require further formulation and accordingly moved for a postponement in order to supplement the papers in the application for an amendment. This Mr ***Y***, on behalf of the respondent objected to this.

[16] Mr ***Y*** contends that the hearing *de novo* is a hearing of the same issues which were placed before the Tax Board. It is not an appeal against the judgment of the Tax Board but a hearing afresh to determine the same issues which were placed before the Tax Board in the first instance. In these circumstances he contends that it is not possible at this stage to grant an amendment to the grounds of appeal which would in effect introduce new grounds of objection after the event. In any event, he contends that the Tax Court was wrong in law and the amendment contended for could therefore not constitute a defence to the penalty imposed. In reply Mr ***X*** acknowledged that in the event that the amendment is refused it would be appropriate at this stage to dismiss the appeal. The second leg of Mr ***Y's*** argument is a matter of law and Mr ***X*** acknowledged that it should be decided at this stage.

[17] On behalf of the respondent it is argued that the provisions of the High Court Rules can only find application where the Rules of the Tax Court are silent. Rule 35 of the Tax Court Rules, so the argument goes, relates to amendments and unless the appellant can bring his application within the provisions of Rule 35 the amendment cannot be granted. Rule 35 of the Tax Court Rules relates to an amendment to a statement under Rule 31, 32 or 33. The grounds for objection are governed by Rule 7 and accordingly Rule 35 can find no application to the amendment of the grounds of objection. There is, however, nothing in Rule 35 which prohibits an amendment to other documents not referred to in the rule.

[18] Prior to 1989 the IT Act provided in section 83(7)(*b*) that a person who had made an objection shall be limited in an appeal to the grounds stated in his notice of objection, unless the Commissioner agrees to the amendment of such grounds, provided that a special court may, on good cause shown, permit a person to amend his notice of objection. (After the amendment to the IT Act in 1989 the same provision was renumbered and retained as section 83(7)(*c*).) The provision empowering a Court to grant an amendment to the notice of objection was however deleted with the amendment of the IT Act in 2001 and was not again repeated.

[19] The reason for limiting the grounds of objection in an appeal to those originally raised was stated by Corbett JA in ***Matla Coal Limited v Commissioner for Inland Revenue*** 1987 (1) SA 108 (A) at 125C-J where he commented on section 83(7)(*b*) (as it then was) as follows:

> "[I]n 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 …
>
> …

> 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."

(The passage was quoted with approval in the Supreme Court of Appeal in the **Computek** case referred to above.)

[20] In these circumstances it seems to me, *prima facie*, that there may be merit in Mr ***Y's*** main argument. By virtue of the conclusion to which I have come below and the limited argument presented to me on this aspect I prefer, however, not to make any finding in this regard.

[21] Mr ***Y's*** second argument is that the Tax Board was incorrect in law in its conclusion relating to the interpretation of Part D of Chapter 15 of the TA Act and that the amendment which the appellant seeks would therefore be excipiable. Mr ***X*** concedes, as alluded to earlier, that if I were to hold that Mr ***Y*** is correct then the amendment cannot be granted and the appeal should then be dismissed at this stage. The proposed amendment is founded on the findings of the Tax Board which I have set out earlier.

[22] The penalty in issue is a percentage based penalty imposed under the IT Act prior to the TA Act coming into force. Once the TA Act came into force the administrative procedures prescribed in the TA Act takes immediate effect. Section 93 of the TA Act provides for SARS to make a reduced assessment, *inter*

alia, if it is satisfied that there is an error in the assessment previously made. It may make such a reduced assessment even in circumstances where no objection has been lodged or an appeal noted. Once such a reduced assessment is made a taxpayer who is aggrieved thereby is entitled to object to the reduced assessment in terms of the provisions of section 104 of the TA Act which must be lodged in the manner, under the terms and within the period prescribed in the rules.

[23] By virtue thereof that the penalty which had been imposed under the IT Act is a percentage based penalty the effect of a reduced assessment is necessarily an adjustment in the penalty. The reduced assessment was made in February 2013 after the TA Act came into effect. The appellant was thereafter notified of the outcome of the assessment and the adjustment to the penalty through a "notice of assessment" which reflected the "due date" for payment of the adjusted penalty as 1 November 2011, being the date of the imposition of the original penalty.

[24] It was common cause before the Tax Board that a "penalty assessment" as envisaged in section 214(1) of the IT Act was not issued. In these circumstances the Tax Board considered that SARS ought first to have issued a "penalty assessment" in terms of section 214(1) of the TA Act whereafter the aggrieved taxpayer ought to have been afforded an opportunity to submit a remittance request on or before the date set for payment of the penalty. Because the penalty assessment had been backdated to 1 November 2011 it was considered that the procedure laid down in Part D of Chapter 15 of the TA Act had not been followed and that the penalty was therefore unenforceable.

[25] It is necessary to have regard to the provisions of the TA Act which are material to this argument. Chapter 15 of the TA Act deals with non-compliance penalties. Section 213(1) prescribes that if SARS is satisfied that an amount of tax was not paid as and when required under the relevant Tax Act, SARS must, in addition to any other "penalty" or interest for which a person may be liable under the said Chapter, impose a "penalty" equal to the percentage of the amount of unpaid taxes prescribed in the relevant Tax Act. Section 214(1) provides that a "penalty" imposed in terms of section 213 is imposed by way of "penalty assessment" and if a "penalty assessment" is made, SARS must give notice of the assessment in the manner prescribed in section 214(1).

[26] Section 215(1) prescribes that a person who is aggrieved by a "penalty assessment" notice may, on or before the date set for payment in the "penalty assessment", in the prescribed form and manner request SARS to remit the penalty.

[27] In the present instance the penalty assessment was made under the IT Act and the appellant was duly notified thereof under the IT Act prior to the TA Act coming into force. The provisions of the TA Act have no bearing on the process whereby the penalty was imposed. As alluded to earlier, a reduced assessment made in terms of the TA Act necessarily gives rise to an adjustment in the previously imposed penalty because it is a percentage based penalty. The adjustment to the imposed penalty is dealt with in section 213(2) of the TA Act which prescribes:

> "(2) In the event of a change to the amount of tax in respect of which a 'penalty' was imposed under subsection (1), the 'penalty' must be adjusted accordingly **with effect from the date of the imposition of the 'penalty'.**" (Emphasis added)

[28] A distinction is accordingly drawn between a “penalty assessment” as described in section 214(1), read with section 213(1), on the one hand, and an adjustment to a “penalty” as set out in section 213(2), on the other. Section 214(3) prescribes that SARS must give the taxpayer notice of the adjustment to the “penalty” in accordance with section 213(2). Section 213(2) does not prescribe any particular form, however, the notice must advise the taxpayer of the adjustment to the penalty and that it will be effective from the date of the imposition of the penalty, as opposed to the date of the adjustment.

[29] On a proper interpretation of the statute it seems to me therefore that a “penalty assessment” relates to the original imposition of the penalty. Notice of such an imposition must be given in accordance with the provisions of section 214(1) and an opportunity must be afforded to the taxpayer to request a remittance under section 215(1). A penalty adjustment, however, is a different issue. Notice of a penalty adjustment must be given in terms of section 213(2). The adjusted penalty is effective from the date of the imposition of the penalty, which in this case occurred on 1 November 2011. The appeal against the imposition of the penalty remains unaffected by the adjustment. In these circumstances it seems to me that the respondent was acutely aware of the provisions of Chapter 15 of the TA Act and proper notice of the adjusted penalty was given in accordance with the provisions of section 213(2) and 214(3). I am constrained to agree with Mr ***Y*** that the provisions of section 214(1) and 215 of the TA Act have no bearing on the appeal and the proposed amendment can therefore not succeed.

[30] In the result:

1. The exception is upheld.

2. The application for amendment of the grounds of objection is dismissed.

3. The appellant's statement of grounds of appeal is struck out.

4. The appeal is dismissed and the penalty is confirmed.

5. The appellant is ordered to pay the costs of the exception.

J W EKSTEEN

JUDGE OF THE HIGH COURT