IN THE TAX COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

Case No: VAT2063

In the matter between:

THE TAXPAYER Appellant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

Date of hearing: 11 November 2019

Date of judgment: 15 November 2019

JUDGMENT

SAVAGE J**:**

Introduction

[1] The appellant, M (Pty) Ltd, provides *inter alia* money-transfer services within Africa, mobile phone credit and *bureau de change* services. In the conduct of

its enterprise it makes both taxable and exempt supplies for value-added tax ("VAT") purposes. It appeals against the refusal by the respondent, the Commissioner for the South African Revenue Service ("SARS"), to grant it approval to apply the Transaction Count Based ("TCB") method of apportionment of its mixed-purpose input tax deductions for the period from 1 February 2014 to 29 February 2016 inclusive.

[2] On 20 February 2017 the appellant applied to SARS for a private binding VAT ruling in terms of s 17(1) read with s 41B of the Value Added Tax Act 89 of 1991 ("the VAT Act") allowing it to apply, with effect from 1 February 2014, the TCB method in terms of which input tax incurred on supplies for mixed purposes is apportioned in the same ratio as the number of taxable transactions. The appellant had in practice not applied the standard turnover-based method of apportionment (the "STB method") contained in Binding General Ruling 16 ("BGR16") but had used an unapproved "*varied turnover-based*" calculation method.

[3] BGR16 expressly recorded as a condition that:

> 'The vendor may only use this method if it is fair and reasonable. Where the method is not fair and reasonable or appropriate, the vendor must apply to SARS to use an alternative method'.

[4] When the appellant applied on 20 February 2017 for a private binding ruling to be issued by SARS, as envisaged in Chapter 7 of the Tax Administration Act 28 of 2011 ("the TAA"), BGR16 was in force, having first been issued on 25 March 2013 with effect from 1 April 2013 and then re-issued on 30 March 2015 with effect from 1 April 2015.

[5] SARS issued a private binding ruling on 8 November 2017 approving the application of the TCB method of apportionment in respect of the appellant's mixed-purpose input tax deductions from 1 March 2016. The application to use the same method in respect of deductions from 1 February 2014 to 29 February 2016, as had been requested by the appellant, was not authorised and on 31 August 2018 the appellant lodged an objection against SARS's refusal to approve the TCB method for that period. SARS initially treated the objection as invalid and refused to determine it on the basis that s 32(1)(a)(iv) of the VAT Act does not allow for such an objection.

On 24 May 2019 the appellant launched an application in this Court seeking that SARS be compelled to treat the objection as compliant with the requirements of Rule 7 of the Rules of this Court, and to make a decision on the objection. On 12 June 2019 an order was granted by Binns-Ward J, with the agreement of the parties, in terms of which SARS undertook to determine the objection, with costs to stand over. Thereafter, SARS refused to allow the application of the TCB method by the appellant from 1 February 2014 to 1 March 2016. This appeal concerns that refusal.

Jurisdiction

[6] SARS contended, both in its Rule 31 statement and its heads of argument filed, that this Court lacks jurisdiction to determine the appeal on the basis that in terms of s 32(1)(a)(iv) a vendor is allowed to object to, and appeal against, any decision given in writing by SARS "*refusing to approve a method for determining the ratio contemplated in section 17(1)*". Since SARS had not refused to approve a method but had refused the retrospective application of the method approved given proviso (iii) to s 17(1) of the VAT Act, SARS contends that this refusal is not a decision contemplated in section 32(1)(a)(iv). Consequently, it submits that this Court lacks jurisdiction and the appellant should instead have challenged the decision by way of review, presumably under the Promotion of Administrative Justice Act 3 of 2000 ("*PAJA*").

[7] Mr *Sholto-Douglas SC*, correctly in my mind, did not pursue this contention with any vigour in argument. On a purposive and contextual reading of s 32(1)(a)(iv) a refusal to approve a method for determination of the ratio contemplated in s 17(1) must necessarily include the refusal to apply any method approved retrospectively. To find differently would be to strain at the language of the provision and lead to an unbusinesslike and unwieldy result, which I am not persuaded was intended by the legislature, to limit the right of appeal and require a review where the issue of retrospectivity is in issue. The provision expressly provides for the right to appeal a refusal to approve a method. The effect of a refusal to allow the retrospective application of a method is to refuse the application of the method in respect of such period. Had it been intended by the legislature that this Court, as a specialist court

established to determine tax disputes of this nature, was not to have jurisdiction to determine a matter such as this, this would have been expected to have been expressly stated in the statute, which it is not. If SARS was correct in its submission, this would serve to remove the right of appeal, only in respect of a narrow group of disputes, from the ambit of this Court's jurisdiction without as much being expressly stated in the statute. That could not have been the legislative intent. It follows for these reasons that from a plain reading of the provision, and having regard to its purpose and context, the matter falls squarely within the ambit of this Court's jurisdiction.

Section 17 of the VAT Act

[8] In issue in this appeal is whether SARS was precluded by law, and more particularly by proviso (iii) to s 17(1) of the VAT Act, from approving the use by the appellant of the TCB method in respect of the period from 1 February 2014 to 29 February 2016. There is no dispute that the TCB method is a suitable or appropriate apportionment method for the appellant's enterprise since SARS approved the use of such method by the appellant with effect from 1 March 2016.

[9] Section 17(1) provides:

> "(1) Where goods or services are acquired or imported by a vendor partly for consumption, use or supply (hereinafter referred to as the intended use) in the course of making taxable supplies and partly for another intended use, the extent to which any tax which has become payable in respect of the supply to the vendor or the importation by the vendor, as the case may be, of such goods or services … is input tax, shall be an amount which bears to the full amount of such tax or amount, as the case may be, the same ratio (as determined by the Commissioner in accordance with a ruling as contemplated in Chapter 7 of the Tax Administration Act or section 41B) as the intended use of such goods or services in the course of making taxable supplies bears to the total intended use of such goods or services: …"

[10] Proviso (iii) reads as follows:

> "where a method for determining the ratio referred to in this subsection has been approved by the Commissioner, that method may only be changed with effect from a future tax period, or from such other date as the Commissioner may consider equitable and such other date must fall –

> (aa) in the case of a vendor who is a taxpayer as defined in section 1 of the Income Tax Act, within the year of assessment as defined in that Act; or
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> (bb) …
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> during which the application for the aforementioned method was made by the vendor."

[11] It is clear from the provision that a ratio must be applied to determine the amount of input tax that may be claimed as a deduction and, since such ratio does not appear from the VAT Act, before SARS issued a general ruling in the form of BGR16, s 17 had no meaningful content. Since the issue of BGR16 as a general ruling, it applies to all vendors to whom s 17 is applicable in producing the formula for the STB method of apportionment.

[12] The appellant contends that BGR 16 does not prescribe or authorise a compulsory or default method to be applied to the apportionment of the appellant's mixed-purpose inputs. This is submitted to be so since BGR16 expressly rendered the approval of the STB method subject to the condition that: *"(t)he vendor may only use this method if it is fair and reasonable. Where the method is not fair and reasonable or appropriate, the vendor must apply to SARS to use an alternative method";* and, on no sensible construction of BGR16 could it be found to permit, let alone prescribe, the STB method for use by a vendor where it was not "*fair and reasonable*".

[13] Having formed the view that the STB method prescribed in terms of BGR16 did not render a "*fair and reasonable*" outcome for it, the appellant applied, as it was entitled, in 2017 for a private binding VAT ruling from SARS in terms of s 17(1). SARS issued such private binding ruling but limited the application of it to the period from 1 March 2016. This was so, given proviso (iii) to s 17(1) which permits a method for determining the ratio to be changed "*with effect from a future tax period, or from such other date as the Commissioner may consider equitable*"; and where it is not changed from a future tax period, it may "*only*" be changed from "*such other date*", if the vendor is a taxpayer, "*within the year of assessment as defined in that Act…during which the application for the aforementioned method was made by the vendor*".

[14] The conditions attached to BGR16 provide for the use of the STB method "*if it is fair and reasonable*". Where a vendor considers its use not to be fair or reasonable, the obligation is placed on the vendor, which "*must apply*" to SARS to use an alternative method. Where the vendor does not form the view that the use of the STB set out in BGR16 is not fair and reasonable, there is no obligation on it to apply to use an alternative method and it follows as a matter of logic that the default position that applies is the STB method as set out in BGR16. A vendor that has not sought an alternative ruling is not entitled to elect to be bound by BGR16 on the basis that it is not fair or reasonable; and it cannot be that a vendor who is enjoined to apply to use an alternative method, but fails or refuses to do so, should be placed in the same position as a vendor who applies timeously.

[15] Where application is made to use an alternative method to that set out in BGR16, the statute allows flexibility to ensure that the correct and appropriate input tax deductions for the particular enterprise are permitted but it provides a time limit on the retrospective application of the alternative method in terms of s 17(1) and proviso (iii). While the appellant takes issue with the restriction on retrospectivity contending that it serves to frustrate the purpose of the statute and BGR16, having regard to the context and purpose of the provision, there is no reason why the legislature should not restrict the period of retrospective application of a private ruling having regard to the context and purpose of the provision and affording the provision a sensible and business-like interpretation to it. As was stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*:[1]

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for

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1 [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18.

> its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document." (Footnotes omitted)

[16] A sensible interpretation of s 17(1) and proviso (iii) is not one that would allow the appellant to have its private ruling applied retrospective to 1 February 2014 in spite of the express statutory limitation on retrospectivity to the contrary. An interpretation that would serve to condone the appellant's tardiness in seeking a private ruling in respect of previous tax years, while nevertheless allowing it the retrospective application of such ruling, strains the language, context and purpose of the provision. It also overlooks the intention of the legislature and the clear risk of administrative uncertainty that would arise. The appellant's suggestion that the period of any such retrospectivity would necessarily be limited by the rules of prescription does not resolve this difficulty, nor does it allow for an interpretation different to that apparent from the plain meaning, purpose and import of the statute.

[17] The fact that SARS may have accepted in 2017, by issuing the private ruling, that the STB method did not render a fair and reasonable outcome for the appellant does not allow a conclusion that, in spite of s 17(1) and proviso (iii), SARS recognised that the application of BGR16 was not fair and reasonable in respect of all previous tax periods. The STB method set out in BGR16 was the only ratio applicable to the appellant until its private binding ruling had been issued in 2017 and proviso (iii) to s 17(1) expressly precluded SARS from issuing a ruling that had effect from a date earlier than 1 March 2016.

[18] A vendor is to pay the net VAT properly attributable to its particular enterprise and deduct the correct portion of its mixed-purpose inputs. S 17(1) read with BGR16 sets out the manner in which this is to be done. An interpretation of s 17(1) which does not accord with the plain language and meaning of the statute, so as to do away with the limitation on the period in respect of which a private ruling may be retrospectively applied, does not artificially limit the objective of the statute or its

operation and nothing in the scheme of the VAT Act compels a different conclusion. For all of these reasons, the appeal must fail.

Costs

[19] The appellant seeks costs in relation to the procedural application before Binns-Ward J on the basis that it was compelled to bring such application after it had reached an *impasse* with SARS, which had treated the objection as invalid and refused to decide it one way or the other, leaving the appellant unable to pursue its objection. It is not in issue that SARS considered the objection only after it was ordered to do so.

[20] Unlike the restrictive provisions of s 130(1) of the TAA in relation to costs orders in tax appeals, s130(3)(b) provides that this Court may order costs as provided in the Rules in "*an interlocutory application or an application in a procedural matter referred to in section 117(3)*." There is no dispute between the parties that the application before Binns-Ward J was such an application.

[21] Since the appellant was substantially successful in that application, in circumstances in which SARS could have avoided the litigation had it simply determined the objection, there is no reason why the costs of that application should not follow the result. I can however find no reason why the costs of two counsel are warranted.

Order

[22] In the result, the following order is made:

1. The appeal is dismissed.
2. The costs of the application before Binns-Ward J are to borne by the respondent on the scale as between party and party.

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K M SAVAGE

Judge of the High Court

Assessors: Mr Q Joseph and Mr T J Ledwaba

Appearances:

For appellant: M W Janisch SC

Instructed by Dingley Marshall

For respondent: A Sholto-Douglas SC and C Tsegarie

Instructed by the State Attorney