HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 37766/2021

REPORTABLE: NO.
OF INTEREST TO OTHER JUDGES: NO
REVISED.
18 JULY 2022

In the matter between:

CRRC E-LOCO SUPPY (PTY) LTD	Applicant
and	
COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Respondent

Summary: Revenue – 3rd Party notice in terms of sections 179(5) and 179(6) of Tax Administration Act 28 of 2011, given prior to a final demand, "satisfaction" that giving notice should be dispensed with.

ORDER

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

JUDGMENT

This matter has been heard by way of open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

The collection of payment in respect of a tax debt can take place by way of the issuing of a notice in terms of section 179 (5) of the Tax Administration Act 28 of 2011 (the TAA) to a third party holding assets belonging to the taxpayer. In terms of section 179 (6) of the TAA, the issuing of such a notice can take place without the South African Revenue Service (SARS) even having issued a final demand for payment of the tax debt, if a senior SARS official is satisfied that the giving of prior notice by way of such a demand might prejudice the recovery of the tax debt. This is what has happened in the present instance and the taxpayer seeks to have such conduct reviewed.

[2] Overview of the parties and the tax debt in question

2.1 The taxpayer in question is the applicant in this application, being CRRC E-loco Supply (Pty) Ltd (CRRC).

2.2 A tax audit conducted by a specialised unit of SARS has concluded that there is *prima facie* evidence that CRRC has overstated the price of locomotives sold to TRANSNET as part of what has since become known as “State Capture”.

2.3 As a result, CRRC has an assessed tax debt in excess of R3,6 billion.

2.4 SARS is the respondent in the application.

2.5 SARS has a statutory obligation to recover tax debts and in the answering affidavit pointed out that the fiscus is currently under strain to maximise such recovery.

2.6 The assessed tax debt has not been satisfied and only partial payment was achieved by the recovery via the "third party notices" which form the subject matter of this application.

2.7 The application is not supported by any direct evidence from CRRC, but only by way of an affidavit by its attorney. The answering affidavit on behalf of SARS has been made by the Stream Head of the Criminal and Illicit Economic Activities Division, Illicit Economy Unit (the IEU).

[3] <u>The decision sought to be reviewed</u>

3.1 The relevant statutory provisions are sections 179(1), 179(5) and 179(6) of the TAA. They read as follows:

> "*179(1) A senior SARS official may authorise the issue of a notice to a person who holds … money … for a taxpayer, requiring the person to pay the money to SARS in satisfaction of the taxpayer's outstanding tax debt …*
>
> *179(5) SARS may only issue the notice referred to in subsection (1) after the delivery to the tax debtor of a final demand for payment which must be delivered at the latest 10 business days before the issue of the notice …*
>
> *179(6) SARS need not issue a final demand under subsection (5) if a senior SARS official is satisfied that to do so would prejudice the collection of the tax debt*".

3.2 The decision of the relevant senior SARS official was taken on 28 June 2021. It was the culmination of a string of previous decisions, but the occurrence which prompted this decision, was the conclusion of the IEU tax audit and its issuance of a Finalisation of Audit letter on 25 June 2021. Pursuant hereto, additional tax

assessments were issued on 26 – 28 June 2021, totaling a tax debt of some R 3, 6 billion.

3.3 On 28 June 2021, after the assessments have been made, the IEU sent an internal memorandum to the head of the Criminal and Illicit Economic Activities Division, Mr Godfrey Baloyi. Mr Baloyi is a senior SARS official as defined in the TAA. The internal memorandum requested approval to issue third party appointments in terms of section 179(6) of the TAA, which request was granted by Mr Baloyi. It is this decision which CRRC seeks to have reviewed and set aside.

3.4 The consequences of the decision were that the China Construction Bank paid R 635 331 652, 00 from CRRC's account to SARS on 30 June 2021 and that Standard Bank had paid R 101 100,00 from CRRC's account to SARS on 8 July 2021.

[4] <u>The reasons why the decision was taken</u>

4.1 SARS contends that the reasons why the decision was taken, were the following:

SARS was dealing with a dishonest taxpayer;

by reneging on its commitment to furnish guarantees, the taxpayer had rendered the funds vulnerable to claims by other parties;

there was an absence of possible prejudice or hardship for the taxpayer;

SARS had a duty to recover taxes as quickly and efficiently as possible;

in light of ongoing correspondence between the parties, the taxpayer had effectively been afforded sufficient *audi alterem partem* opportunities.

4.2 *Ad the issue of a dishonest taxpayer*: SARS relied on the *prima facie* evidence of large scale corruption committed by the taxpayer in its dealings with Transnet as part of the reasons for its conclusion. In addition, SARS determined that

there was *prima facie* evidence of tax fraud in excess of R 4 billion on the part of the taxpayer. This came about as a result of the taxpayer substantially having understated its tax liability in its returns for the tax years from 2013 to 2018. During the tax audits which followed, the taxpayer submitted incomplete ledgers for the tax years of 2014 to 2016, failed to provide details to transaction listings in the debtor/creditor sub-ledgers for 2015 and 2016 and failed to provide such sub-ledgers at all for the 2013, 2014, 2017 and 2018 tax years. The schedules of local and foreign purchases provided did not reconcile with the ledgers, trial balances or financial statements. In the taxpayer's response to a request to furnish information requested by SARS in terms of section 46 of the TAA, irrelevant documents were submitted and, in an attempt to raise "hardships", the taxpayer misrepresented the interest it was earning on the amounts held in the bank accounts in question.

4.3 *Ad the reneging on commitments to furnish guarantees*: on 12 December 2017 the South African Revenue Bank (SARB) issued blocking notices in terms of the Exchange Control Regulations in respect of R 1 255 058 117.48 held in CRRC's bank account held at the China Construction Bank, Sandton. Subsequent similar notices were issued, the last of which was on 26 February 2020. A blocking notice has to be lifted after 36 months in terms of the Currency and Exchanges Act 9 of 1933. Consequently, the first "block" of R 1, 2 billion was due to be lifted on 12 December 2020. This triggered SARS into obtaining a preservation order in terms of section 163 of the TAA against these funds. SARS and CRRC reached an agreement, however, that upon the furnishing of guarantees by CRRC, the funds would be released. This agreement had been made an order of court. It provided for the furnishing of two guarantees by South African Commercial banks in the amounts of that held by the China Construction Bank as referred to above plus and additional R 1, 5 billion. Despite some correspondence reflecting, after some delay, that the obtaining of backing from China to secure the guarantees takes time, no guarantees had to date of the third party notices some months later, been furnished.

4.4 *Ad the absence of prejudice*: the senior SARS official was of the view that, since CRRC was in any event not trading and, even if it had been trading, could not utilise the finds due to the preservation order, it could suffer no prejudice or hardship if the funds are paid over by the banks as third parties.

4.5 *Ad the duty to recover taxes*: The payment of the funds to SARS by the banks would go some way towards satisfying SARS's obligation to recover taxes quickly and effectively, in this instance, from this particular taxpayer.

4.6 *Ad the opportunity to be heard*: It is impermissible for an administrator to forego the requirements of procedural fairness on the basis that it would have made "no difference" if prior notice had been given or not. See *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* 2014 (1) SA 604 (CC) at paragraphs 23 – 27. In the present case, the prior notice would have been the final demand contemplated in section 179(5). There had however been extensive correspondence between SARS and CRRC prior to the issuing of the notices wherein the issues of the existence of the tax debt and the surrounding circumstances, including CRRC's inability to satisfy the tax debt had been addressed. SARS relied on the decision in *Hindry v Nedcor Bank Ltd and Another* 1999 (2) SA 757 (W) in support of its argument that sufficient opportunity had been furnished to the taxpayer to be heard.

[5] Evaluation

5.1 CRRC's attorneys contends that the reasons advanced as to why the senior tax official took the decision, did not constitute "reasonable grounds" and that, absent such grounds, the decision was not rational and open to review. CRRC relied on *Walele v City to Cape Town and Others* 2008 (6) SA 129 (CC) at para 60 as basis for this contention.

5.2 Despite the contentions raised above, the allegations of taxpayer dishonesty, tax fraud and breach of guarantee commitments, were largely left uncontroverted. No *bona fide* disputes regarding those issues have been demonstrated as contemplated in *Wightman t/a J W Contruction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at paragraphs 12 – 13. The best CRRC could do, faced with these serious and weighty accusations, was to have its attorney deal with them in the most cursory and generalised fashion as follows: "*the applicant has consistently denied any involvement in or knowledge of any form of corruption relating to the locomotive supply agreements. In any event, the applicant denies that the*

investigation conducted by SARS was "independent". It was and remains part of a well-orchestrated and unlawful campaign by a group of organs of state to place pressure on the applicant to reach a settlement with Transnet".

5.3 The "bald, vague and sketchy" manner in which this conspiracy theory has been raised results therein that no weight should be afforded to it.

5.4 The attack on the reasonableness of the decision, insofar as it was based on the report and memorandum from the IEU in respect of the recoverability of tax by way of third party payments only go so far as arguing that the memorandum only alleges that recovery of the tax debt would be prejudiced and not that recovery would be in jeopardy.

5.5 SARS concluded that there was a risk of the funds being expatriated once the block is lifted. Declining the invitation to have his client depose to an affidavit, CRRC's attorney replied that, should expatriation occurs, repatriation could be ordered against a taxpayer in terms of section 186 of the TAA. Whilst this legal argument may be correct, no factual evidence has been produced by CRRC whereby SARS' fears have been allayed. Furthermore, the risk or jeopardy of recovery of a tax debt by a delinquent taxpayer who might retreat back to China with its funds appear to me to create such a reasonable fear that it justifies an avoidance of that risk by having the third party's banks pay the funds over to SARS.

5.6 CRRC's attack on SARS's reliance on the decision in *Hindry* (referred to in paragraph 4.6 above) is also misplaced. Whilst CRRC is correct that *Hindry* was based on section 179's predecessor, being section 99 of the Income Tax Act 58 of 1962, and that the two sections do not read the same, the portion of the decision relied on by SARS is the following: (1) the limitation in the recovery proceedings of a right to be heard prior to the issuing of a third party notice, is a Constitutionally justifiable limitation and (2) when the taxpayer had been corresponding with SARS about the tax debt at issue, including the basis on which the claim was arrived at, there cannot be a valid complaint of unfairness and the non-application of the *audi alterem partem* principle.

5.7 The *Hindry* principle has been followed in related recovery proceedings. In *Contract Support Services (Pty) Ltd and Others v Commissioner for SARS and Others* 1999 (3) SA 1133 (WLD) in respect of section 47 of the VAT Act, the court held that not all administrative actions have to comply with the *audi alteram partem* rule and that it was not necessary to give a taxpayer of hearing before appointing a third party in order to achieve the purpose for which the power was conferred on SARS. This was subsequently confirmed in *Industrial Manpower Projects (Pty) Ltd v Commissioner for SARS and Others* 2001 (2) SA 1026 (W) and followed in *Smartphone SP (Pty) Ltd v ABSA Bank Ltd and Another* 2004 (3) SA 65 (WLD) at paragraph 16 by Ponnan J.

5.8 There is little doubt that SARS had been entitled to issue the third party notices and thereby recover the funds in question to satisfy an existing tax debt. The fact that the tax debt may be subject to an objection, does not detract from this. See *Metcash Trading Ltd v CSARS* 2001 (1) SA 1109 (CC) at 1118.

5.9 The highwater mark of CRRC's complaint, is that the third party notices had not been preceeded by a final demand. On the facts of this case, I conclude that the senior SARS official in question had sufficient grounds to justify his decision to issue the notices without such demand as contemplated in section 179(6) of this TAA.

5.10 In the event of the above conclusion being wrong, CRRC is not seeking a referral back to the senior SARS official, but a setting aside of the decision (only). This would simply result in the funds again becoming liable to be the subject of a preservation order and thereafter the subject of new third party notices. In the meantime all the consequences which would otherwise have followed upon a final demand, have already occurred: CRRC had applied for a suspension of payment and this had been considered and been refused. No review or other steps had been taken in respect of that decision. The full assessed tax debt therefore still remains payable, pending conclusion of the objection process. There is therefore nothing to gain for CRRC by reviewing and setting aside the third party notices, which have in any event already been fulfilled. It is for this reason that SARS argued that, even in the event of CRRC being successful, in terms of section 172(2) of the Constitution and section 8 (2) of PAJA, the status quo should be maintained as constituting just

and appropriate relief in the circumstances. I agree. The refusal of the application would achieve the same result.

5.11 In my view therefore, the application should be dismissed. I find no cogent reasons why costs should not follow the event.

[6] Order

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

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing:	25 April 2022
Judgment delivered:	18 July 2022

APPEARANCES:

For Appellant:	Adv C Louw SC together with Adv R Mastenbroek and Adv K Burt
Attorney for Appellant:	B Makukunzva Attorneys, Sandton c/o Phosa Loots Inc Attorneys, Pretoria
For Respondents:	Adv H G A Snyman SC together with Adv C Steinberg SC and F Storm
Attorneys for Respondents:	Savage Jooste & Adams Attorneys, Pretoria