THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 1231/2021

In the matter between:

UNITED MANGANESE OF KALAHARI
(PTY) LTD **APPELLANT**

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *United Manganese of Kalahari (Pty) Ltd v Commissioner for the South African Revenue Service* (Case no 1231/2021) [2023] ZASCA 29 (24 March 2023)

Coram: PONNAN, SALDULKER, MOTHLE and GOOSEN JJA and KATHREE-SETILOANE AJA

Heard: 22 February 2023

Delivered: 24 March 2023

Summary: Section 105 of the Tax Administration Act 28 of 2011 – a taxpayer may only dispute an assessment by objection and appeal in terms of ss 104 to 107, unless the high court directs otherwise.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mabuse J, sitting as court of first instance):

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

JUDGMENT

Ponnan ADP (Saldulker, Mothle and Goosen JJA and KATHREE-SETILOANE AJA concurring)

[1] On 24 March 2017, the respondent, the Commissioner for the South African Revenue Service (SARS), issued a letter to the appellant, United Manganese of Kalahari (Pty) Ltd (UMK), indicating that an audit will be conducted in respect of the 2011, 2012 and 2013 income tax years of assessment.

[2] Following several requests for information from UMK, as well as witness interviews, SARS issued a letter of audit findings in terms of s 42(2)*(b)* of the Tax Administration Act 28 of 2011 (TAA) setting out the outcome of the audit and the grounds of SARS' proposed additional assessments. UMK was afforded 21 business days in terms of s 42(3) of the TAA within which to respond in writing to the facts and conclusions set out in the letter of audit findings. UMK and SARS thereafter agreed that considering, *inter alia*, the complexities of the audit, the 21-day period would be extended to 30 August 2019. In the interim, UMK directed a letter to SARS on 16 July 2019 requesting clarity regarding certain of the allegations and findings in the letter of audit findings, to which SARS replied on 30 July 2019. On 30 August 2019, UMK responded to the facts and conclusions set out in the letter of audit findings, as supplemented by SARS' reply.

[3] The finalisation of the audit letter was subsequently issued five months later on 31 January 2020 and accompanied by the additional assessments. Pursuant to the finalisation of the audit, SARS made the following adjustments to UMK's taxable income and levied the following amounts of tax and interest in respect of the relevant income tax years of assessment:

Tax Period	Adjustment in terms of s 31(2) of the Income Tax Act	Additional Income Tax at 28% (s 31(2) of the Income Tax Act)	Dividend Tax at 15% (s 31(3) of the Income Tax Act)	Understatement Penalty at 50% (s 223(1) of the TAA)	Interest (s 89quat(2) of the TAA)
2011	R79 977 814.00	R22 393 787.92			R19 765 034.72
2012	R169 694 577.00	R47 514 481.56			R22 653 108.82
2013	R299 645 099.00	R83 900 628.80	R44 946 765.00	R41 950 314.00	R67 910 383.65
Total	R549 317 490.00	R153 808 898.28	R44 946 765.00	R41 950 314.00	R110 328 527.19

[4] By virtue of the provisions of s 31(2) of the Income Tax Act 58 of 1962 (ITA), SARS further issued an assessment for dividend withholding tax in respect of the deemed in specie dividend arising from the adjustment made to UMK's 2013 income tax year of assessment, as follows:

Adjustment in terms of s 31(2) of the Income Tax Act	Deemed dividend for purposes of s 31(3) of the Income Tax Act	Dividend Tax at 15%
R299 645 099.00	R299 645 099.00	R44 946 765.00

[5] The additional assessments (in the amount of R351 034 504.47 in total) provided that payment by UMK to SARS was due by 29 February 2020. This excludes interest levied on the dividend tax assessment, which SARS intends to levy with effect from1 July 2015.

[6] On 17 February 2020, notice was given on behalf of UMK as required in terms of s 11(4) of the TAA of its intention to institute legal proceedings against SARS in the Gauteng Division of the High Court, Pretoria (the high court). In the application that followed, UMK sought an order in these terms:

'1. That the additional assessments raised by SARS in respect of the Appellant's 2011, 2012 and 2013 income tax years of assessment . . . be reviewed and set aside.

2. It be declared that in paragraph (d)(vA) of the "connected person" definition in section 1 of the Income Tax Act No. 58 of 1962 (as amended) (the "Income Tax Act") the term "managed or controlled" means the exercise of actual *de facto* management or the exercise of actual *de facto* control.

3. That, insofar as it may be required, the following relief be granted to the Appellant:

3.1 the Appellant is exempted from any obligation to exhaust any internal remedy(ies) in terms of section 7(2) of the Promotion of Administrative Justice Act No. 3 of 2000; and/or

3.2 in terms of section 105 of the Tax Administration Act No. 28 of 2011, this court adjudicates all of the relief sought by the Appellant in this application.'

[7] Although several points *in limine* were raised by SARS in opposition to UMK's application, only one pertaining to jurisdiction need presently detain us. It was expressed thus in SARS' answering affidavit:

'36. I am advised that the jurisdiction of this Court is expressly conditional, precisely to prevent tax-related issues being raised in this Court instead of the Tax Court, without the most careful prior regulation by this Court. Otherwise, litigants as seems to be the case in this matter, would flout the careful distinction of functions between this Court and the Tax Court.

37. The making or issuing of additional assessments is regulated under section 92 of the [TAA] to correct the prejudice to SARS or the *fiscus* in respect of an assessment previously made based on incorrect declarations. Chapter 9 of the [TAA], part B, particularly section 105 thereof provides that:

"105. Forum for dispute of assessment or decision.

A taxpayer may only dispute an assessment or "decision" as described in section 104 in proceedings under this chapter, unless a high court otherwise directs."

38. Therefore, the only forum in which assessments, including additional assessments, may be challenged is the Tax Court, unless a High Court directs otherwise. I am advised that the High Court would only so direct in circumstances where a litigant has clearly pleaded and made out a case for the High Court to deviate adjudication of issues in or arising from a tax dispute from the Tax Court to the High Court. Neither does [UMK's] founding nor its supplementary founding affidavit make out a case for such deviation.

39. In the circumstances, this Court does not have the necessary jurisdiction to hear a review regarding the merits of an additional assessment. No case has been pleaded (so that it could be explicitly answered) for the relief sought that the High Court should direct a deviation in terms of section 105 of the [TAA], neither has UMK made out a case for such relief on pertinent facts justifying the deviation (so that these could be rebutted by SARS). The net effect is that there is no justification for such direction to be made in terms of section 105 of the [TAA].'

[8] The response in the replying affidavit was that:

'7.1 [UMK] denies that this Honourable Court does not have the necessary jurisdiction to hear and decide the prayers contained in [UMK's] Notice of Motion dated 24 March 2020; section 105 of the TAA explicitly reserves this Court's concurrent jurisdiction. In addition, it is respectfully contended that the Tax Court does not have the necessary jurisdiction to review and set aside administrative action such as the impugned action(s) taken by [SARS].

. . .

7.3 [SARS'] statement that "exceptional circumstances" must be shown, in terms of section 105 of the TAA, is misplaced. I am advised by [UMK's] legal representatives that section 105 does not contain this threshold requirement contended for by [SARS]; in deciding whether to exercise its discretion, this Court may take into account a host of considerations. In any event, [UMK] submits that a proper case has been made for this court to exercise its inherent jurisdiction and to grant the prayers contained in [UMK's] Notice of Motion.'

[10] The high court held:

'[11] S 105 of the TAA makes provision for disputes of assessment or decision to be heard in the High Court subject to the proviso that the High Court directs that this is so. It is common cause, in this application, that the High Court has not been approached to direct that the dispute about the additional assessment shall be heard by it, that is the High Court.

[12] The High Court would only so direct that a dispute of the assessment or decision in the circumstances where a litigant has clearly pleaded and made out a case for the High Court to deviate adjudication of issuing in or arising from a tax dispute from the Tax Court to a High Court. Nowhere in its affidavit does UMK make out a case for such deviation. It is SARS' case that in the circumstances, this court lacks the necessary jurisdiction to hear a review regarding the merits of the additional assessment. This is so because UMK has not pleaded a case for

the relief sought that a High Court should direct a deviation in terms of s 105 of the TAA. The application may therefore only be dismissed on this point *in limine*.'

[11] In that, the high court cannot be faulted. In *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd*, I recently had occasion to express the view that:

'Section 105 is an innovation introduced by the TAA from 1 October 2011. It has moreover been narrowed down by an amendment made in 2015. Its purpose is to make clear that the default rule is that a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA and may not resort to the high court unless permitted to do so by order of that court. The high court will only permit such a deviation in exceptional circumstances. This much is clear from the language, context, history and purpose of the section. Thus, a taxpayer may only dispute an assessment by the objection and appeal procedure under the TAA, unless a high court directs otherwise.

This is reinforced by the amendment of s 105 in 2015. The original version read as follows:

"A taxpayer may not dispute an assessment or "decision" as described in section 104 in any court or other proceedings, except in proceedings under this Chapter or by application to the High Court for review." (Underlining for emphasis)

Pre-amendment, the taxpayer could elect to take an assessment on review to the high court instead of following the prescribed procedure. That is no longer the case. The amendment was meant to make clear that the default rule is that a taxpayer had to follow the prescribed procedure, unless a high court directs otherwise.

This understanding is reinforced by the explanatory memorandum that accompanied the Tax Administration Law Amendment Bill of 2015. It described the purpose of the amendment of s 105 as follows:

"The current wording of section 105 creates the impression that a dispute arising under Chapter 9 may either be heard by the tax court *or* a High Court for review. This section is intended to ensure that internal remedies, such as the objection and appeal process and the resolution thereof by means of alternative dispute resolution or before the tax board or the tax court, be exhausted before a higher court is approached and that the tax court deal with the dispute as court of first instance on a trial basis. This is in line with both domestic and international case law. The proposed amendment makes the intention clear but preserves the

right of a High Court to direct otherwise should the specific circumstances of a case require it."'

The purpose of s 105 is clearly to ensure that, in the ordinary course, tax disputes are taken to the tax court. The high court consequently does not have jurisdiction in tax disputes unless it directs otherwise. . . .' [1]

[12] It follows that the appeal must fail and in the result it is accordingly dismissed with costs including those of two counsel.

V M PONNAN

JUDGE OF APPEAL

[1] *Commissioner for the South African Revenue Service v Rappa Resources (Pty) Ltd* [2023] ZASCA 28 (24 March 2023) paras 17 – 20.

APPEARANCES

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