IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 61689/2019

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

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IN THE MATTER BETWEEN:

PURVEYORS SOUTH AFRICA MINE SERVICES (PTY) LTD Applicant

AND

THE COMMISSIONER FOR THE SOUTH AFRICAN

REVENUE SERVICE Respondent

JUDGMENT

FABRICIUS J

[1] This application was decided on the papers and detailed heads of argument.

[2] The following relief was sought by applicant:

1. That the Respondent's decision taken on 09 May 2019 (in terms whereof it was held that the Applicant's voluntary disclosure application submitted on 04 April 2018 in terms of the provisions of Part B, of Chapter 16, of the Tax Administration Act 28 of 2011 (as amended) ("the TAA") be reviewed and set aside;

2. That the Respondent's decision referred to in prayer 1 above be corrected and/or substituted and/or varied as follows:

    2.1 It is declared that the voluntary disclosure application submitted on behalf of the Applicant to the Respondent on 04 April 2018, constitutes a "voluntary" disclosure as contemplated in the provisions of section 227(a) of the TAA;

3. In the alternative to prayer 2 and 2.1 above, that the Respondent's decision referred to in prayer 1 above, be remitted to the Respondent and that the Respondent be directed to reconsider its decision taken on 09 May 2019;

4. That the Respondent be ordered to pay the costs of this application, only in the event of Respondent resolving to oppose any of the relief sought herein.

[3] The parties' written argument set out their respective contentions in some detail and I will refer thereto with appreciation as they enable me to provide a properly structured judgment.

[4] The following facts are common cause:

4.1 Purveyors had imported an aircraft into South Africa during 2015 which it then used to transport goods and personnel to other countries in Africa;

4.2 Purveyors became liable for the payment of Import VAT to SARS in respect of the importation of the aircraft in 2015;

4.3 Purveyors failed to pay Import Vat to SARS;

4.4 during the latter part of 2016, Purveyors manifested reservations about its failure to have paid import VAT and accordingly engaged with certain representatives of SARS to obtain a view on its liability for such tax. In doing so, it conveyed to SARS's representatives a broad overview of the facts but no more;

4.5 following these engagements, Purveyors was advised by SARS on 1 February 2017 that the aircraft should have been declared in South Africa and VAT thereon paid but more importantly, it was advised that penalties were applicable as a result of the failure to have aid the VAT;

4.6 Purveyors, approximately a year later, subsequently applied to SARS for voluntary disclosure relief in terms of section 226 of the TAA;

4.7 SARS declined to grant relief on the basis that Purveyors had not met the requirements of section 227 of the TAA.

[5] The two relevant actions of the Tax Administration Act 28 of 2011 ("the TAA") are sections 226 and 227, which read as follows:

"(1) A person may apply, whether in a personal, representative, withholding or other capacity, for voluntary disclosure relief.

(2) If the person seeking relief has been given notice of the commencement of an audit or criminal investigation into the affairs of the person, which has not been concluded and is related to the disclosed 'default', the disclosure of the 'default's not being voluntary

for purposes of section 227, unless a senior SARS official is of the view, having regard to the circumstances and ambit of the audit or investigation, that—

(a) …

(b) the 'default' in respect of which the person has sought relief would not otherwise have been detected during the audit or investigation; and

(c) the application would be in the interest of good management of the tax system and the best use of SARS' resources.

(3) A person is deemed to have been notified of an audit or criminal investigation, if—

(a) A representative of a person;

(b) An officer, shareholder or member of the person, if the person is a company;

(c) a partner in a partnership with the person;

(d) a trustee or beneficiary of the person, If a person is a trust; or

(e) a person acting for or on behalf of or as an agent or fiduciary of the person

has been given notice of the audit or investigation."

Section 227 provides as follows:

"Requirements for valid voluntary disclosure.—

The requirements for a valid voluntary disclosure are that the disclosure must-

(a) be voluntary;

(b) involve a 'default' which has not occurred within five years of the disclosure of similar 'default' by the applicant or a person referred to in section 226(3);

(c) be full and complete in all material respects;

(d) involve a behavior referred to in column 2 of the understatement penalty percentage table in section 223;

(e) not result in a refund due by SARS; and

(f) be made in the prescribed form and manner."

The concepts of “default”, “voluntary” and “disclosure” make up the three essential components of this section.

Section 225 defines “default” to mean the submission of inaccurate or incomplete information to SARS. In the present instance the concept of “default” is not contentions as it is common cause that applicant had failed to pay import VAT in 2015 when it should have done so. Hence its application for the voluntary disclosure relief.

The inquiry herein must therefore be concentrated on the concepts of “voluntary” and “disclosure”.

[6] Respondent submitted that the chronology of events demonstrates that the relevant application did not constitute a “disclosure”, nor was it made voluntary:

6.1 On 30 January 2017 Purveyors requested an appointment with SARS to discuss its liability to pay VAT in respect of the aircraft. In the e-mail, Purveyors explained to SARS the broad nature of the default it had committed;

6.2 On the 1st of February 2017, SARS responded through an e-mail from Mr Duppie Du Preez ("Mr Du Preez") in which he indicated that the aircraft was subject to penalty implications. He also requested to see documentation in terms of Section 101 of the Customs and Excise Act 91 of 1964;

6.3 On 2 February 2017 Mr K Thakudi acknowledged receipt and indicated that he would revert as soon as possible with the requested information;

6.4 On the 29th of March 2017 Mr Du Preez wrote to Purveyors in which he explained the reasons why VAT and penalties were payable. Mr Du Preez further indicated that Purveyors needed to appoint a clearing agent to assist it with an Import Permit in order to regularize its continued default;

6.5 Purveyors responded on the same day (29 March 2017) in which it indicated that it understood from Mr Du Preez's e-mail and from their telephone discussion that VAT output and custom duties were applicable as well as fines and penalties;

6.6 Mr Du Preez responded with an e-mail dated 30th March 2017 in which he sought to clear the misunderstanding. He indicated that there existed no waiver of potential penalties and further that if the tax to the Receiver is late the taxpayer would be liable for penalty and interest.

6.7 On the 16th May 2017 Mr Du Preez wrote a further e-mail to Purveyors indicating that it had to address the matter as he had allowed Purveyors sufficient time to regularize its tax affairs. Purveyors responded and indicated that it was still awaiting a response from its Head Office.

6.8 Subsequent thereto, Purveyors took no further steps until the 4th of April 2018 when it applied for voluntary disclosure relief. This was approximately a year after the last letter from Purveyors to SARS.

[7] It was applicant's contention that the crux of applicant's case was that as at the date of submission of its VDP application it had not been given notice by the respondent of the commencement of an audit or criminal investigation into the affairs of the applicant, which had not been concluded as contemplated by the provisions of s 226(2) of the TAA, and that the effect thereof was that this application was indeed "voluntary" as contemplated in s 227 (a) of the Act, despite the said prior knowledge on the part of the respondent.

[8] Respondent had contended that s 227 of the Act envisages a disclosure of information or facts of which SARS had been unaware of.

[9] In answer thereto applicant's argument proceeded as follows:

9.1 The provisions of Part B of Chapter 16 of the TAA (sections 225 to 233 dealing with the "voluntary disclosure programme") do not require in any manner or form, either expressly or by implication, that a VDP application is to be considered through the lens of section 227 of the TAA on the basis that it is compulsory for such application to disclose information or facts which SARS was unaware of.

9.2 In terms of the statute there simply does not exist such a requirement.

9.3 Regard had to the relevant statutory provisions, including section 227 of the TAA, prior knowledge on the part of the Respondent is not a disqualifying factor.

9.4 In this respect the ambit of the Respondent's contention is too wide, particularly if regard is had to the provisions of section 226(2) of the TAA, which I have quoted.

9.5 Section 226(2) does not consider mere knowledge by the Respondent concerning a particular "default" as a disqualification in respect of a VDP.

9.6 The Respondent's approach calls for a reading in of implied provisions in section 226(2) and/or section 227(a) of the TAA. The threshold for implying words into a statutory provision is very high: It is a dual test, restated by Corbett JA (later CJ) in Rennie N.O. v Gordon N.O. 1988 (1) SA 1 (A) at 22 D-H as follows:

"Over the years our Courts have consistently adopted the view that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands ...".

Clearly that test is not met here.

9.7 The word "voluntary" is not defined in the TAA. The Merriam-Webster Dictionary defines the term "voluntary" as follows:

"proceeding from the will or from one 's own choice or consent
…
unconstrained by interference ...
done by design or intention ... acting or done of one 's own free will without valuable consideration or legal obligation ...of, relating to, subject to, or regulated by the will ... having power of free choice ... provided or supported by voluntary action".

9.8 It is contended that, on consideration of the facts pleaded by both parties in the present application, it cannot be held at a factual or legal level that the Applicant's VDP application was not made "voluntary" as contemplated in section 227(a) of the TAA.

9.9 Express indication that the Legislature did not regard mere knowledge (on the part of the Respondent and/or his officials) to constitute a disqualification against a VDP application is contained in the provisions of section 229(c) of the TAA, which provides as follows:

"229 Voluntary Disclosure Relief

Despite the provisions of a tax Act, SARS must pursuant to the making of a valid voluntary disclosure by the applicant and the conclusion of the voluntary disclosure agreement under section 230-

…

(c) grant 100% relief in respect of an administrative noncompliance penalty that was or may be imposed under Chapter 15 or a penalty imposed under a tax Act, excluding a penalty imposed under that Chapter or in terms of a tax Act for the late submission of a return."

9.10 The highwater mark of the VDP statutory provisions contained in the TAA (insofar as disqualification of certain VDP applications is concerned) is that stated in section 226(2) of the TAA - namely where a person seeking relief has been given notice of the commencement of an audit or criminal investigation, such may be regarded as not voluntary. In this regard the statute is silent on the issue of any prior knowledge by the Respondent of the relevant default.

9.11 Sections 226 and 227 of the TAA do not provide for interpretation in terms whereof an application for VDP relief can notably be regarded as not being made voluntary if the Respondent had prior knowledge of the relevant "default".

9.12 In Commissioner, South African Revenue Service v United Manganese of Kalahari (Pty) Ltd 2020 (4) SA 428 (SCA) at pp 433 para [8] the SCA expressly held that the established approach to the interpretation of statutes:

"... is an objective unitary process where 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 its production. The approach is as applicable to taxing statutes as to any other statute. The inevitable point of departure is the language used in the provision under consideration. "

9.13 In the light of the principles laid down by the SCA in UMK it is contended that SARS' approach calls for an understanding/interpretation of the term "voluntary", where same appears in section 227(a) of the TAA, that cannot

reasonably (considering the language used in the provision under consideration and the plain dictionary meaning of those words), be attributed to the term. SARS' approach requires the term "voluntary" to be interpreted to mean that prior knowledge by the Respondent of the relevant default renders the application to be non-voluntary. The plain language of the section does not allow for such interpretation.

[10] Before dealing with respondent's submissions regarding the correct interpretation of sections 226 and 227 of the TAA, I deem it important, as did counsel for respondent, to place the relevant sections into the proper context. See: Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 SCA at par 26.

10.1 The VDP came into effect on 1 October 2012. Its purpose is to enhance voluntary compliance in the interests of good management of the tax system and the best use of SARS's resources. It seeks to encourage taxpayers to come forward on a voluntary basis to regularize their tax affairs with SARS and thus avoid imposition of understatement penalties (and, in certain circumstances, criminal prosecutions).

10.2 VDP is further aimed at promoting ethical and moral conduct by incentivizing errant taxpayers to make amends in respect of any defaults by them by informing SARS of the default and of which SARS is ignorant. By doing so, a taxpayer may obtain the voluntary disclosure relief contemplated in section 229.

10.3 The VDP applies to all taxes administered by SARS with the exception of customs and excise.

10.4 Once a valid voluntary disclosure has been made, the following relief follows as a matter of course:

10.4.1 effective immunity from prosecution in respect of any tax offence arising from the default that formed the subject matter of the VDP application;

10.4.2 a reduction or waiving of the understatement penalty that would have been payable had the VDP application not been made, either successfully or at all; and

10.4.3 the waiving of certain other penalties.

[11] In the light of the wording, purpose and context of the relevant sections, respondent's argument continued as follows:

11.1 Section 226 contemplates two types of applications, namely those that are made in the absence of any notice to commence an audit or investigation and those that are made when notice has been given or deemed to be given. The requirements set out in section 227 apply to the former in whole and to the latter in part.

11.2 In the present instance, it is common cause that no notice to commence any audit or investigation had been given. It follows that Purveyors VDP application fell into the former category and thus had to satisfy the requirements of section 227 of the TAA in all respects and in particular section 227(a).

11.3 Purveyors emphasis on the fact that no notice had been given in terms of section 226(2) of the TAA, misses the point. That is because:

11.3.1 section 226(2) deals with disclosures by taxpayers who are already subject to an audit or criminal investigation. A taxpayer not subject to an audit or criminal investigation cannot make a disclosure under section 226(2) as that taxpayer would not

have met the jurisdictional requirements of 226(2) i.e. being subject to an audit or investigation;

11.3.2 section 226(1) allows any person to bring a VDP application and Purveyors application is one in terms of this section;

11.3.3 SARS case is not premised on section 226(2) but rather on section 227. It is the later section that is applicable to Purveyors VDP application;

11.3.4 a VDP application must comply with the requirements of section 227 whether made terms of sections 226(1) or 226(2) (for those subject to an audit or investigation and a senior SARS official considers it appropriate).

11.5 Purveyors contends that if notice of an audit has been given then a subsequent VDP application cannot be voluntary. Conversely, if no notice of an audit has been given, then the only possible result is that it was voluntary.

11.6 This argument is premised on an interpretation of section 227 of the TAA which is inconsistent with its context and purpose. Section 227 is broad in its ambit and is not subject to section 226(2). The legislature deliberately did not confine involuntary applications to the giving of an audit notice in terms of section 226(2) of the TAA. The reason is obvious. There may be other circumstances under which an application is made which would not be classified as voluntary. The present is such an instance. Had the legislature intended to confine an involuntary application to one circumstance, namely the receipt of a notice, it could have easily done so.

11.7 Moreover, as submitted earlier, the purpose of the VDP provisions is to incentivize errant taxpayers to come clean. That

purpose would be defeated if the only circumstance under which a VDP application were to be held as involuntary was the receipt of a notice of an audit in terms of section 226(2) of the TAA.

11.8 The interpretation favoured by Purveyors is too narrow and does not, accord with the purpose of the section and what it seeks to achieve.

11.9 In the instant case, the only relevance that section 226 (as a whole) has with section 227 is through section 226(1) in terms of which the VDP application was brought. The determination of whether it is valid or not is made in terms of section 227 without reference to section 226(2).

[12] The further question was whether the VDP application was "voluntary". The term is not defined but its ordinary meaning is "an act in accordance with the exercise of free will". If there is an element of compulsion underpinning a particular act, it is no longer done voluntary. In the context of Part B of Chapter 16 of the TAA, a disclosure is not made voluntary where an application has been made after the taxpayer had been warned that it would be liable for penalties and interest owing from its mentioned default. It was submitted that the application was brought in fear of being penalised and with a view to avert the consequences referred to.

[13] Lastly, it was contended on behalf of respondent that there had been no disclosure of information of which SARS had been unaware. This was not the case here. When applicant made the VDP application it was obviously aware that SARS knew of its default. It in fact disclosed nothing new the application was therefor not a valid one. There can be no disclosure to a person if the other already has knowledge thereof: certainly not in the present statutory context.

[14] I agree with respondent's counsel that:

14.1 The interpretation put forward by applicant is too narrow and does not accord with the purpose of the said sections or what they seek to achieve;

14.2 The VDD application was not “voluntary” for the reasons referred to;

14.3 There was no disclosure to Respondent of information of which it was not already aware.

[15] The result is therefore the following:

15.1 The application is dismissed with costs including the costs of 2 counsel.

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H FABRICIUS

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE OF HEARING: NO ORAL HEARING

DATE OF JUDGMENT: 25 AUGUST 2020

FOR THE APPLICANT: P A SWANEPOEL SC

INSTRUCTED BY: RM PARTNERS INCORPORATED C/O JW BOTES INCORPORATED

FOR THE RESPONDENT: M A CHOHAN SC & T CHAVALALA

INSTRUCTED BY: VEZI & DE BEER INCORPORATED