

REPUBLIC OF SOUTH AFRICA



**IN THE TAX COURT OF SOUTH AFRICA
(AT JOHANNESBURG – VIRTUAL HEARING)**

CASE NO: 14302

- (1) REPORTABLE: NO
- (2) OF INTEREST TO OTHER JUDGES: NO
- (3) REVISED: NO

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DATE

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SIGNATURE

In the matter between:

ABC LIMITED

APPLICANT

and

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

RESPONDENT

J U D G M E N T

FISHER J:**Introduction**

[1] This is an application to compel discovery. It is interlocutory to a tax appeal, currently set down to be heard in this Court in October 2020, in which the applicant seeks to set aside four additional income-tax assessments issued by SARS for the 2009 to 2012 tax years.

[2] The applicant, ABC Limited seeks discovery of documentation pertaining to Mutual Agreement Procedures ("MAP") between South Africa's competent authority and the competent authorities of Uganda, Rwanda, Nigeria, Swaziland and Iran which relate to means to combat double- taxation. I will say more about MAPs later.

[3] South Africa's competent authority, as the authorised representative of the Commissioner for the South African Revenue Service (SARS), opposes.

Facts

[4] The applicant is a multinational telecommunications conglomerate which has various subsidiaries that operate in Africa and the Middle East. These subsidiaries use the ABC brand, for which they pay royalties to the applicant.

[5] SARS raised the disputed additional assessments in terms of section 31 of the Income Tax Act 58 of 1962 (the ITA), on the basis that the royalty payments made by fourteen of the applicant's subsidiaries were less than they would have been had they been made on an arms-length basis. SARS accordingly seeks to adjust the applicant's income for the relevant years of assessment in terms of section 31(2) of the ITA on the basis that the Commissioner does not consider that the royalty rate levied by the applicant in respect of each of the aforementioned subsidiaries constitutes an arm's-length price. In addition to the subsidiaries in the jurisdictions referred to above, the tax appeal initially also concerned subsidiaries in Nigeria, Swaziland and Iran. The disputes in relation to these three jurisdictions have become settled.

[6] The applicant contends that the disputed assessments insofar as they relate to Uganda, Rwanda, Nigeria, Iran and Swaziland would result in double taxation. Specifically, it is contended that SARS is seeking to tax the applicant on income derived by its Ugandan, Rwandan, Nigerian, Iranian and Swazi subsidiaries which have already been subjected to tax by the tax authorities in those jurisdictions.

The object and operation of a MAP

[7] In order to prevent double taxation, South Africa has entered into bilateral Double-Taxation Agreements (DTAs) with a number of countries, including the five countries that are the subject of this application. Each of the five DTAs contains a provision providing for a MAP. In simple terms, the object of a MAP process is for the competent authorities of each contracting State under a DTA to endeavour, by mutual agreement, to resolve a situation where a taxpayer might be subjected to double taxation.

[8] In general terms, a MAP works as follows. If a taxpayer considers that the action of one or both of the contracting States results in or will result in double taxation, then the taxpayer may invoke a MAP. This obliges the competent authority to entertain the objection of the taxpayer if it appears to be justified. If not, the MAP ends. If the competent authority entertains the objection, it must endeavour to arrive at a satisfactory solution which probably means a solution satisfactory to both the competent authority and the taxpayer. In attempting to arrive at a satisfactory solution, both the competent authority and the taxpayer must act reasonably and in good faith. At this stage the competent authority will consider whether it can resolve the taxpayer's objection unilaterally – i.e. without liaising with the tax authority of the other jurisdiction. If no satisfactory solution is arrived at between the taxpayer and the tax authority, only then is the competent authority obliged to attempt to resolve the matter by mutual agreement with the competent tax authority of the other contracting State. In these circumstances, the competent authorities are required to 'endeavour' to come to an agreement.

[9] The interaction between the competent authorities is not litigious. It is a frank, generally informal discussion between States aimed at resolving the taxpayer's objection by mutual agreement. It is also a process in respect of which a taxpayer has no right to participate or any right to any disclosure concerning the discussions and interactions that may have taken place between States.

The dispute re discovery

[10] The applicant has taken the view that it is entitled to discovery of the documents exchanged between the South African competent authority and the other five authorities pursuant to the applicant's MAP requests (referred to as 'the MAP documents') because of the operation of Rule 36 of the Tax Court rules which make discovery of relevant documents compulsory. Adv T SC, who appeared for the applicant, argues that SARS is, in terms of the MAP process, entitled to disclose the MAP documents to a taxpayer and that, in terms of Rule 36, is obliged to disclose the documents. Thus he argues that the MAP documents must be discovered.

[11] Adv B SC, who appeared for the respondent, argues that the applicant is not entitled to discovery of these documents because they are protected from disclosure by virtue of the operation of the legislative scheme that governs the MAP procedure, by section 68 of the TAA, and by public-interest privilege. In any event and as a starting point on the discussion, he argues that the documents are not relevant. Adv T argues that the documents are clearly relevant and not, in any way, protected from disclosure.

[12] Adv B is correct in his submission that the relevance issue is the starting point of the enquiry and that it can and must be decided with reference to the pleaded case. I thus turn to deal with whether the documents have been shown to be relevant to the appeal.

Discussion on relevance

[13] At the outset, it must be noted that our courts are reluctant to second-guess a discovery affidavit, which is generally regarded as conclusive – “save where it can be shown either (i) from the discovery affidavit itself or (ii) from the documents referred to in the discovery affidavit or (iii) from the pleadings in the action or (iv) from any admissions made by the party making the discovery affidavit, that there are reasonable grounds for supposing that the party has or has had other relevant documents in his possession or power, or has misconceived the principles upon which the affidavit should be made”.¹

[14] It was held in *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa and Others*² that the Plaintiff is entitled only to discovery of documents relevant to issues in pleadings. It was further held that an applicant is required to identify portions thereof on which reliance is placed and indicate the case which is sought to be made on the strength thereof.

[15] An application of this nature has to be considered on a balance of probabilities in order to determine whether the documents in issue require production.³

[16] The applicant claims in the application that the MAP documents are relevant to only one of the issues in the tax appeal being the pleaded claim that – “to the extent that the dispute concerns the amounts subjected to the MAPs, it is not ready for adjudication”.

¹ *Federal Wine and Brandy Co Ltd v Kantor* 1958 (4) SA 735 (E) at 749G.

² 1999 (2) SA 279 (T).

³ See: *Rellams (Pty) Ltd v James Brown and Hamer Ltd* 1983 (1) All SA 47 (N).

[17] It is common cause that the MAP's in issue have not yet been resolved. Thus the question to be decided on this pleaded case is simply this: Can this court finally determine ABC's tax liability if ABC's MAP remedies have not yet been exhausted?

[18] Whether the tax appeal and the MAPs can run concurrently is a legal issue. The Court will have to consider the relevant legislation, including the TAA, the Income Tax Act, the Tax Court rules and the relevant DTAs and decide whether, as a matter of law, a taxpayer can delay a Tax Court appeal by requesting a MAP.

[19] In its heads of argument, the applicant seeks to make a new and more general argument as to relevance: that because the MAP exchanges are part of an attempt by SARS and the other competent authorities to "determine an arm's length royalty payable to ABC by its subsidiaries", they "go to the heart of the main issue in the tax appeal". This is a different case to that made out in the founding affidavit in the application to compel and it is not pleaded. Thus on *Swissborough* This argument should not be considered. However, even if I were to consider it, it is any event bad in law. The MAP documents, to the extent that they say anything about the applicant's tax liability, contain only each competent authority's opinion on what the applicant's tax liability is. This is inadmissible for being irrelevant.

[20] The Applicant also argued that the deponent to the respondent's answering affidavit, Mr X cannot speak to relevance in this instance because he does not claim that he has had sight of the pleadings in the tax appeal or the documents that have already been discovered. This criticism loses sight of the fact that the issue is one for legal argument rather than one which is fact dependant.

Conclusion

[21] The documents are not relevant to the pleaded issues. In light of this decision ,which is dispositive of the application, it is not necessary that I consider the arguments raised as to protection from disclosure and public interest privilege.

Order

[22] I thus order as follows:

1. The application is dismissed with costs including the costs of senior and junior counsel where employed.

FISHER J
HIGH COURT JUDGE
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing : 26 August 2020
Date of Judgment : 31 August 2020