REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT MEGAWATT PARK)

CASE NO: 13230

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

..... **.....**
DATE **SIGNATURE**

BEFORE:

JUDGE FISHER **PRESIDENT**
MR ANIEL KANEE SOMA **ACCOUNTANT MEMBER**
MR TSEPANG G TSEKOA **COMMERCIAL MEMBER**

In the matter between:

MR X APPELLANT

and

THE COMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE RESPONDENT

J U D G M E N T

FISHER J:

Introduction

[1] This is an appeal against an income tax assessment issued by SARS for the years of assessment 2005 to 2007.The assessment was issued after SARS had conducted an audit of the appellant's financial affairs. On 24 February 2010, SARS delivered a letter of audit findings to the appellant to allow the appellant an opportunity to show cause and demonstrate why the findings were wrong and why the assessment should not be issued in the proposed terms. The appellant responded to the letter of audit findings on 12 March 2010. After due consideration of the reasons advanced by the applicant and on 25 May 2010 the assessment was issued.

[2] The appellant appealed against the assessment. Most of the issues under appeal were resolved between the parties prior to the appeal hearing. The only issues remaining for adjudication by this Court relate to the taxation levied in respect of an amount of R1 670 099.85 paid to the appellant by an entity which was then known as the V Trust and which has since changed its name to VG. The appellant's case in relation to whether this payment amounts to gross income is the subject of the appeal. SARS also imposed an additional tax charge of 90% of the tax chargeable in respect of this payment. This charge is also appealed both in that it is alleged to flow from the incorrect assessment and on the basis that it was an incorrect exercise of discretion by the Commissioner.

Facts

[3] On 15 June 2006 the appellant received an offshore payment R1 670 099.85 from V Trust (now VG), an entity apparently registered in Jersey. This amount was included by SARS in the appellant's taxable income in the 2007 year of assessment.

[4] In response to the audit findings in relation to this amount, the appellant explained that the amount was a loan by the V Trust to him which had to be repaid by him. It was thus a debt and not income he said. In support of this explanation, the appellant provided SARS with a document entitled 'acknowledgement of debt' dated 14 June 2006. In terms of the document the amount in issue was received from the V Trust for the payment of legal fees and was repayable on detailed terms. The Acknowledgement of Debt is on what appears to be a letterhead which contains a logo of the V Trust and reflects that it has been signed by the appellant and two unnamed witnesses. It is not signed by the V Trust. It reads as follows in relevant part:

> "I, Mr. X ('the Debtor') do hereby admit that I am liable, and hold myself bound to V TRUST or nominee ('the Creditor') for the due and proper payment of the amount of R1 670 099.85 [ie the exact amount of the payment in issue] by reason of the Payment of LEGAL FEES ('the Principal

> Debt') and furthermore I declare that I am bound by the conditions set out in the annexure [an annex to the documents contained detailed terms] which document I have initialled for purposes of identification.
>
> THUS DONE AND SIGNED at MIDDELBURG on this 14 day of JUNE 2006 in the presence of the undersigned witnesses:"

[5] Thus the appellant initially objected to the audit on this version. SARS, unimpressed with the paucity of information provided around the acknowledgment of debt, disallowed the objection and issued the assessment. In his grounds for appeal the appellant reiterated his version that the payment was a loan from V Trust and not income.

[6] The appeal was initially set down for hearing before this Court on 29 October 2018. The appellant applied for the postponement of that hearing on the grounds that he had now instructed an auditor, Mr Y to investigate the payment. It was suggested that Mr Y's investigations had revealed a different basis for the payment to that originally raised both in the objection and the appeal. The postponement was granted.

[7] The appellant subsequently sought leave to amend his grounds of appeal so as to advance a new version as to the reason that the payment of the amount in issue is not taxable. This new version is to the effect that the payment from the V Trust was the repayment of a shareholder's loan and thus not income.

[8] I was seized with the adjourned appeal hearing and the application to amend the notice of appeal. There was an attempt on the part of the appellant to stall the hearing yet again on the basis that the application for leave to amend, which was opposed by SARS, should be determined first. The matter however proceeded as a whole before me. I allowed the amendment and thus this appeal proceeds on the version as amended to reflect that the amount was the repayment of a shareholder's loan.

The evidence of Mr Y

[9] The appellant did not testify. Instead he relied on the evidence of Mr Y who testified as to his investigations into the reason for the payment. These investigations were undertaken more than twelve years after the fact. The matter had previously been dealt with by Mr Z who, at that stage (2011), managed the financial affairs of the appellant.

[10] Mr Y's testimony, in the main, entailed taking the Court through correspondence which he had entered into with employees of VG which, as I have said, was previously V Trust. An examination of these communications is core to the determination of this appeal.

[11] The communications appear to have begun in May 2018, presumably in preparation for the 29 October hearing.

[12] On 14 May 2018 Mr Y made telephonic contact with Mr F, a Director of VG. This was followed up with email explaining that the appellant had been a client of V Trust during 2006 and asking for any information relating to the appellant's affairs.

[13] On May 15 2018, Mr F replied by email stating that the name of the entity had been changed to VG. He explained further as follows:

> "We administer entities such as Trusts and Companies and so forth and Mr X must have been connected in some way to an entity. Without knowing the entity it is difficult for me to assist.' He concluded 'Also when you called yesterday, you mentioned (I think) making a remittance. Can you please elaborate on that? I would like to help but I need more information to do so."

[14] On the home front, Mr Y established that A Bank had reported the incoming foreign transaction to the Reserve Bank. By September 2018 Mr Y had begun communicating with Ms JJ, a manager at VG. He had also during this time engaged the services of Mr BC, a director of S Services registered in the UK and apparently also active in the BVI.

[15] It seems that, through these investigations, Mr Y was able to establish that CDF, a company registered in the BVI and of which the appellant was the beneficial owner had paid the funds in issue to VG. CDF was dissolved in June 2006 and it appears that money held by it was then paid over to VG, on the instruction of the appellant and on the basis that it would, in due course, be paid to him – which it was. Ms JJ wrote that "If further information is required [she] would need to try and obtain the files from [VG's] archiving, however as [VG] only have an obligation to obtain files for 10 years they may no longer exist." And "If they do and depending on the information required [VG] will levy a charge".

[16] On 02 October Mr Y wrote to Mr BC and Ms JJ in the following optimistic and, it must be said, tendentious terms:

> "Mr BC and Ms JJ,
> As l understand the payment of the amount to Mr X, was upon the dissolution of the Company, thus a dividend that is not taxable due to the double tax treaty. ls (sic) there any financial statements of CDF to reflect this, or is it possible to put in writing that the amount was a declaration of a final dividend."

[17] This appears to be an attempt to contrive yet another version as to the payment and the reason why tax should not be paid. This apparently bore no fruit and on 10 October 2018 Mr Y again contacted Ms JJ to find out if any records were available regarding 'the remittance to the beneficial owner, Mr X. Ms JJ replied that VG did not have the company's records.

[18] As I have said, these communications took place in preparation for the 29 October 2018 hearing which was postponed for further investigation and amendment.

[19] In July 2019, Ms JJ confirmed that CDF was incorporated on 1 April 1998 and dissolved on 25 July 2006 – but no other information was forthcoming.

[20] At some stage, an agreement of settlement between A Holdings and A (Pty) Ltd was disclosed. It does not emerge from whence this emanates, but it is part of the papers. Presumably the appellant would have had a copy of it all along in that he signed it. In terms thereof an amount of R1 million was paid to CDF and thus, in effect, to the appellant, him being the beneficial holder of the interest in CDF. This settlement payment is thus strongly suggestive of a source of part of the money.

[21] Mr Y ultimately explained to Ms JJ what the agenda was. On 16 July 2019 he wrote an email stating as follows:

> "The situation is as follows, namely:
>
> The South African Revenue Service ('SARS') did what is called a 'lifestyle audit' on Mr X...One of these payment (sic) included in the audit was this amount received from VG (previously 'V Trust'). In order to present the case to our legal team, I suggested to do (sic) an affidavit as an expert witness to confirm the following, namely:
>
> 1. That Mr X was the beneficial owner of CDF since the inception of the BVI entity.
>
> 2. The transactions of income and capital of nature occurred in the BVI entity and that there were loans made by Mr X to CDF.
>
> 3. That the company was dissolute on the 18 May 2006 and that the funds in the bank account were paid to V Trust as the 'owner' of the shares on behalf of the beneficial owner of the shares. This amount was the loan account in the books and accounts of CDF, as a shareholder loan. The closing of the bank account the amount left in the bank account was equal to the remainder of the shareholder's loan.
>
> 4. That the shareholder's loan of the beneficial owner (due to his status as a non-resident) was refunded and paid to Mr X.
>
> 5. That although there were discussions on a loan and therefore an acknowledgement to debt, the loan and the acknowledgement of debt did not happen or occur and that the acknowledgment of debt was therefore cancelled."

[22] The upshot of all the communications and machinations of Mr Y on behalf of the appellant is that Ms JJ and VG were unwilling to make the confirmations and leaps of supposition sought by Mr Y on behalf of the appellant.

[23] Thus three versions have been entertained in relation to the payment: first that the payment was a loan, second that the payment was a dividend (which had already attracted tax in the BVI) and third, the version which is now contended for, of repayment of a shareholder's loan.

Application for postponement

[24] In the midst of Mr Y's evidence, he attempted to latch onto a document which related to the Reserve Bank clearance of the funds and which had been obtained from PP Bank . He said that one of the codes on that document served to indicate that the payment was a repayment of a loan. Yet another postponement was sought in order to put evidence of this nature before the court through an expert who could comment on the codes. I refused the application for postponement.

[25] The reasons for the refusal of the postponement are as follows. There was no explanation for why this evidence was not forthcoming previously. Indeed it seems that the evidence proposed would not even be of an expert nature. One would expect that the codes in question are written down somewhere and could be put into evidence by way of legal submission. In any event and most conclusively, in relation to this proposed evidence, the use of a particular code would not amount to objective proof of the nature of the transaction underlying the payment and would, to my mind, take the matter no further on the probabilities.

Legal Principles

[26] The burden to prove that an assessment issued by SARS is wrong is on the applicant.[1] Essentially then, there is a statutory presumption in favour of the validity of an assessment issued by the Commissioner, and the onus is placed on the appellant to show that an amount included in the assessment is not taxable. In *Commissioner for Inland Revenue v Goodrick*,[2] it was held[3] that what is required of the taxpayer to discharge this onus is affirmative evidence that satisfies a court upon a preponderance of probability that the amount is not taxable income.

Discussion

[27] The obvious problem in relation to the case of the appellant is that there is no direct evidence from the appellant to confirm any particular version. The case is built on an attempt by Mr Y to construct a version out of nothing. A troubling feature of the case is the unexplained presence of the acknowledgment of debt for the precise amount of the payment which was initially offered in support of the loan version. The appellant has not explained how this document came about or why it was later discarded. In the absence of any explanation, this is strongly suggestive of an attempt to fabricate evidence. A further aspect which gives me disquiet is the unexplained settlement agreement. One must assume that the appellant has

---

1 Section 82 of the Income Tax Act of 1962 (as amended) and section 102 of the Tax Administration Act of 2011 (TAA).

2 1942 OPD 1, 12 SATC 279.

3 Ibid at 296.

some background information in relation to CDF and the transaction that emerges from the settlement agreement. However, again the appellant fails to explain the receipt of these funds and indeed how they were treated after payment.

[28] The case of the appellant falls hopelessly short of discharging his burden. The impression created is one of contrivance and intentional obfuscation rather than an attempt to offer a proper account of the payment. The tactic adopted is clearly also one of delay and frustration of the proceedings.

[29] This brings me to the imposition of the additional tax.

The additional tax

[30] The obligation to pay additional tax was imposed in terms of section 76(1) of the Income Tax Act which read as follows in relevant part:

> "76(1) A taxpayer shall be required to pay in addition to the tax chargeable in respect of his taxable income—
>
> (*a*) ...
>
> (*b*) ...
>
> (*c*) If he makes an incorrect statement in any return rendered by him which results or would if accepted result in the assessment of the normal tax at an amount which is less than the tax properly chargeable, an amount equal to twice the difference between the tax as assessed in accordance with the return made by him and the tax which would have been properly chargeable."

[31] The Commissioner was entitled to remit such additional charge in terms of section 76(2) which read as follows:

> "76(2) The Commissioner may remit the additional charge imposed under sub-section (1) or any part thereof as he may think fit: Provided that, unless he is of the opinion that there were extenuating circumstances, he shall not so remit if he is satisfied that any act or omission of the taxpayer referred to in paragraph (*a*), (*b*) or (*c*) of sub-section (1) was done with intent to evade taxation."

[32] On 1 October 2012 this section was repealed by section 271 of the TAA but the penalties were imposed in terms of this section. The onus in relation to the imposition of these penalties has however now reversed[4] and is no longer on the taxpayer as it was under the, now repealed, section 82 of the ITA.

[33] In *Commissioner for Inland Revenue v Da Costa*[5] the court found that the Tax Court must exercise its own, original discretion, irrespective of the penalty imposed by the Commissioner.

[34] In relation to the determination of the 90% additional tax, SARS called Ms K an Audit Specialist with some 14 years' experience.

[35] Ms K testified that she undertook the audit, and discovered the undeclared amount in issue. She drew a report for the SARS Committee which made the determination of the penalty. She testified that her recommendation of 90% was born out of the fact that she had obtained some co-operation in relation to the audit undertaken.

[36] I was impressed by the evidence of Ms K. It emerges from the papers filed in this matter that such co-operation as there was, emanated from Mr W. That there was no co-operation as to the income in issue is clear regard being had to the manner in which the appellant and Mr Y have dealt with this matter. Indeed, as I have said, the evidence and the manner in which it was derived and presented shows guile on the part of the appellant in relation to the source of the income. Bearing in mind that such conduct amounts to evasion, and given that under such circumstances SARS was enjoined by the relevant legislation to impose a 200% additional tax, it seems to me that the appellant has been treated leniently by SARS.

Conclusion

[37] The appellant has fallen far short of discharging his onus as to the incorrectness of the assessment. Indeed, the submissions show that the attempts to do so were contrived. SARS on the other hand was able to establish that the imposition of the additional tax was more than reasonable and competent in the circumstances of the case.

---

[4] In this regards section 129(3) of the TAA provides:

"(3) In the case of an appeal against an understatement penalty imposed by SARS under a tax Act, the tax court must decide the matter on the basis that the burden of proof is upon SARS and may reduce, confirm or increase the understatement penalty."

And in terms of section 270(2)(*d*), appeals launched and not completed prior to 1 October 2012 are to be concluded under the provisions of the TAA.

[5] 1985(3) SA 768 (A).

Costs

[38] There is no reason why the costs should not follow the result of this appeal.

Order

[39] I thus make an order which reads as follows:

1. The appeal is dismissed.
2. The appellant is to pay the costs.

_____

FISHER J
HIGH COURT JUDGE
GAUTENG LOCAL DIVISION
JOHANNESBURG

Concurring:

_____

MR ANIEL KANEE SOMA

_____

MR TSEPANG G TSEKOA