

REPUBLIC OF SOUTH AFRICA



**TAX COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

CASE NO: IT 25390

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

In the matter between:

XY MINING

Appellant

and

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

Respondent

J U D G M E N T

**THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE
CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE AND TIME OF
HAND DOWN SHALL BE DEEMED TO BE 18 MAY 2021 AT 10H00**

MALI J

INTRODUCTION

[1] Tax exemptions, amongst others are designed to assist qualifying public benefit organisation (“PBO”), *inter alia* by allowing PBO opportunity to attract financial resources and also to provide them with enabling environment in which to achieve their objectives. This is based on the framework that a PBO by designation exists to relieve the state of certain burdens. Accordingly, only those organisations that qualify as PBOs should be released from tax burden. In this regard the Income Tax legislation is deliberate to grant PBOs retrospective and or proactive PBO status; thus resulting to tax exemption.

[2] In the present matter, the respondent, a Tax Administration Authority declined to grant retrospective status to the appellant/Trust. The matter turns on the proper interpretation of section 30(3B) of the Income Tax Act, 58 of 1962 (“ITA”), read with the definition of “public benefit organisation” contained in section 30(1) of ITA.

[3] The court first granted the order for separation of issues in terms of section 33(4) of the Uniform Rules of the court. It is convenient and appropriate that the question of law concerning the interpretation of the impugned section is separated from the factual considerations.

BRIEF BACKGROUND

[4] The appeal relates to the 2016 year of assessment. On 11 September 2018 the appellant, a Trust applied for approval for exemption from income tax retrospectively from 1 February 2016.

[5] On 25 September 2018 the respondent via email correspondence informed the appellant that from the financial statements of the year ending 31 December 2016 it is not reflected that the appellant / trust carried on public benefit activities. The appellant was also requested to indicate whether it had distributed any funds to the other approved PBOs as well as whether it carried on public benefit activities.

[6] Subsequently exchange of correspondence between the parties ensued. It revolved around the concerns as stated by the respondent that appellant had not carried on public benefit activities. In the end the respondent provided the appellant the following reasons, for not granting the approval from 1 February 2016:

[6.1] The appellant did not conduct any public benefit activities since its establishment and accordingly did not qualify for tax exemption status prior to 26 June 2018.

[6.2] The appellant's trust deed did not comply with all the requirements set out in section 30 of the Act.

[6.3] The appellant was not compliant as its compliance history showed the 2017 to 2019 income tax returns were outstanding as at 1 March 2020.

INTERPRETATION OF SECTION 30(3B) AND SECTION 30(1) OF THE ITA

[7] Section 30(3)(B) reads:

"Where an organisation applies for approval, the Commissioner may approve that organisation for the purposes of this section (with retrospective effect, to the extent that the Commissioner is satisfied that that organisation during the period prior to its application complied with the requirements of a "public benefit organisation "as defined in subsection (1)."

Own underlining.

[8] Section 30(1) provides as follows:

"public **benefit organisation**" means any organisation—

(a) Which is—

(i) a non-profit company as defined in section of the Companies Act or a trust or an association of person that has been incorporated, formed or established in the Republic; or....."

[9] Pertaining to the interpretation of statutes and documents the law has long been settled; as follows:

"The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, 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. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.¹⁵ The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language

of the provision itself',¹⁶ read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”¹

[10] Moseneke DCJ; as he then was held that a contextual approach requires that legislative provisions are interpreted in the light of the text of the legislation as a whole (internal context).²

[11] At paragraph 39.3. of the respondent's heads of arguments³ it is submitted that section 30(3B) is unambiguous and its plain. Natural interpretation provides the Commissioner with the discretion to approve an organisation as a public benefit organisation with retrospective effect. The law still supports the interpretation process despite the unambiguity of a text. In this regard the following holds:

“Courts must have due regard to the context in which the words appear, even where the words to be construed are clear and unambiguous.”⁴

[12] At paragraph 39.6 of the Respondent's heads of argument; it is submitted that it will be absurd to argue that the Commissioner should not enquire whether there was compliance with the requirements set out in section 30(3) of ITA. Key thereto, is whether the Trust Deed complied with the requirements and whether the appellant was tax compliant.

[13] In this matter one is grappling with two clear words **retrospective** and **approval**. Nevertheless, the context where the words appear need to be meticulously examined. The context need to be approached as to the extent that the Commissioner should be satisfied that organisation during the period prior to its application complied with the requirements of a “public benefit organisation “as defined in subsection 1.

[14] Furthermore, the purpose of the provisions of section 30(3B) is to empower the Commissioner to grant the qualifying PBO retrospective status. The statute makes it clear that the Commissioner needs to be satisfied that the applicant meets the requirements of section 30(1), nothing less and nothing more.

¹ *Natal Joint Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

² *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 53.

³ 030-24 Case Lines.

⁴ *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2004 (7) BCLR 687 (CC) para 90.

[15] The efforts to advance the aims of section 3B are well expounded in the Proposal for Explanatory Memorandum to the Tax Laws Amendment Act No.17 of 2009 as follows:

“Reasons for change

Many PBOs and clubs applying for exemption do so after several years of activity. This delay may stem from a lack of expertise or due to an over-emphasis on starting activities. Failure to seek prompt approval then keeps the relevant parties from subsequently seeking relief on a going forward basis because of concerns about the potential tax liability from pre-existing activities.

Proposal

If a PBO or recreational club applies to tax exempt status, it is proposed that the Commissioner be given discretionary powers to retroactively approve tax exemption status, in order to obtain this relief, the Commissioner must be satisfied that the relevant PBO or club was substantially within its given status in terms of existing law.”

[16] From the above it appears that the legislature had ample opportunity to add or subtract; in order to explain the rationale of the impugned section. It left out the accordingly important issue of tax compliance and trust deed enquiry decried by the respondent. Of significance the proposal sets out what the Commissioner needs to be concerned about; which is whether the PBO was substantially within its given status in terms of the existing law.

[17] It is not open for the Commissioner to write its own desired sections within the setting of section 30(3B). The Commissioner's wide discretion cannot be translated to the Commissioner reading in sections or the law or what it thinks the law could have said. The warning that Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used; should also be applicable to the administrators of legislation. See *Natal Joint Pension Fund v Endumeni* above.

[18] The appropriated approach by the Commissioner is similarly not allowed in applying the amendment of section 30(3B) of the Act, retrospectively. The effect of the amendment is that the PBO has to meet tax compliance requirement. Mindful of delving into the facts, it is common cause that the amendment only came into being on 15 January 2020 long after the appellant applied for the PBO status.

[19] The appellant's application precedes section 30(3B) amendment. In simple terms at the time of application by the appellant the compliance history of the taxpayer was not sanctioned by the provisions of 30(3B). The Law of General Presumption is that legislation cannot apply retrospectively. In conclusion the provisions of section 30(3B) of the ITA are capable of being interpreted without any assistance.

[20] In the result;

1. The point of law must succeed.
2. There is no order as to costs.

N.P. MALI
JUDGE OF THE HIGH COURT