REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

HELD AT GAUTENG SOUTH LOCAL DIVISION, JOHANNESBURG

CASE NO: IT 2020/95

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED.

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SIGNATURE DATE

In the matter between:

CDC (PTY) LTD Appellant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

This judgment was handed down electronically by circulation to the parties` representatives by E-mail. The date and time for hand – down is deemed to be 19 November 2021

MALI J

[1] This is an application for default judgment in terms of rule 56 of the Rules ("the Rules") promulgated under section 103 of the Tax Administration Act 28 of 2011 ("TAA"). Rule 56(1) provides as follows:

> "If a party has failed to comply with a period or obligation prescribed under these rules or an order by the tax court under this Part, the other party may—
>
> (*a*) deliver a notice to the defaulting party informing the party of the intention to apply to the tax court for a final order under section 129(2) of the Act in the event that defaulting party fails to remedy the default within 15 days of delivery of the notice; and
>
> (*b*) if the defaulting party fails to remedy the default within the prescribed period, apply, on notice to the defaulting party, to the tax court for a final order under section 129(2)
>
> (2) The tax court may, on hearing the application—
>
> (*a*) in the absence of good cause shown by the defaulting party for the default in issue make an order under section 129(2); or
>
> (*b*) make an order compelling the defaulting party to comply with the relevant requirement within such time as the court considers appropriate and, if the defaulting party fails to abide by the courts order by the due date, make an order under section 129(2) without further notice to the defaulting party."

[2] Section 129(2) of the Income Tax Act 5 of 1962 ("the Act") makes provision for default judgment. The applicant's application is premised on the respondent's alleged failure to file grounds of assessment to be hereinafter referred to as rule 31 statement in term of the Rules.

[3] The applicant who is the taxpayer had been assessed by the respondent and later filed notice of objection to the respondent's assessment pertaining to the disallowance of assessed loss. The disallowance resulted in reduction of assessed loss of R38 587 720.00 carried forward from the 2011 year of assessment being reduced to nil. In the event that default judgment is granted in favour of the applicant, the net effect is the allowance of R38 587 720.00 assessed loss for future years of assessment.

[4] Briefly the procedure in terms of the rules is that in the event that the taxpayer is not satisfied with the disallowance of objection, the taxpayer must file notice of appeal in order to take the matter further. Subsequent to the filing of the notice of appeal the respondent is required to file rule 31 statement or the grounds of assessment and opposing appeal.

[5] In the present case the issue is whether the applicant is entitled to the final relief in the form of default judgment because the respondent did not file rule 31 statement. The respondent's defence is that there is no Notice of Appeal before the respondent or the Commissioner. Therefore, the respondent had no reason to file a rule 31 statement.

[6] First I deal with the application by the respondent to file supplementary affidavit, same opposed by the applicant. It is trite law filing of additional affidavits is within the discretion of the court. The supplementary affidavit by the respondent is meant to prove that the appellant did not deliver its grounds of appeal as envisaged under rule 10(2), or that the notice of appeal was defective. Rule 10(2) provides as follows:

> "A notice of appeal must—
>
> (*a*) be made in the prescribed form;
>
> (*b*) if a SARS electronic filling service is used, specify an address at which the appellant will accept delivery of documents when SARS electronic filling service is no longer available for the further progress of the appeal;
>
> (*c*) specify in detail—
>
> (i) in respect of which grounds of the objection referred to in rule 7 the taxpayer is appealing;
>
> (ii) the grounds for disputing the basis of the decision to disallow the objection referred to in section 106(5); and
>
> (iii) any new ground on which the taxpayer is appealing;
>
> (*d*) be signed by the taxpayer or the taxpayer duly authorized representative; and
>
> (*e*) indicate whether or not the taxpayer wishes to make use of the alternative dispute resolution procedures referred to in Part C, should the procedures under section 107(5) be available.

[7] In exercising the discretion to determine the filing of further affidavit the court is enjoined to consider, amongst others the time period, prejudice attendant upon the applicant and or balancing the prejudice apprehended by both parties, prospects of success.

[8] Ms D, Counsel for the respondent submitted that in the event the supplementary affidavit is not admitted, the respondent will not be in a position to ventilate its defence properly and that might lead to the applicant obtaining a final relief. In the event the final relief is granted without the merits of the case fully heard there is prejudice apprehended. The prejudice attendant extends to the public at large; in that that the public funds would be utilised to reduce any amount of tax due for the years commencing from 2012 by the applicant or taxpayer without the respondent having considered the matter properly.

[9] There is no prejudice submitted in respect of the applicant. I take into account that the supplementary affidavit was filed two and a half months after the filing of the replying affidavit, which is not an inordinate time period. Secondly the respondent is the guardian of public funds as collector thereof. The applicant having not showed any perceived prejudice it is appropriate to allow the respondent's supplementary answering affidavit. In the result respondent's application for filing of the supplementary affidavit is successful.

The application

[10] The applicant delivered its rule 56 application in July 2019. The applicant later withdrew the application because the founding affidavit was defective, because amongst others it was not commissioned. Ms A of the respondent considered the matter finalised and closed the file. Nearly two years later the applicant lodged this Rule 56 application based on the same facts. Of significance by the applicant is that the respondent had failed to file its rule 31 statement, therefore giving entitlement to the applicant to obtain default judgment against the respondent.

[11] The issue for determination is whether the applicant had filed notice of appeal in compliance with rule 10(2) as quoted above, or whether there is a valid notice of appeal, the supporting documents delivered and uploaded by the applicant on SARS/respondent's e-filing profile on 22 July 2016 is central to the resolution of this application. "Annexure A" is the supporting document in question.

[12] "Annexure A" consists of special power of attorney, copy of the identity document of Mr E the representative taxpayer/ applicant. Furthermore, there is "Annexure B" which is the Notice of assessment, "Annexure C" is the letter from the respondent advising of the Notice of objection. "Annexure D" which according to the applicant tis then Notice of Appeal, is a typed undated document headed "Memorandum" and second line below the heading is "Notice of Appeal -2012". Third page of the same document contains grounds of appeal. The last page is bears the name JT.

[13] It is common cause that on 22 July 2016 at 7h21 Mr JT, the applicant's representative records the applicant's **intention** to file Notice of Appeal (own emphasis). The respondent's officer at 9h13 send an email to JT reading as follows:

> "Kindly provide me with a date by which NOA will be submitted."

On the same day on at 9h25 the reply by JT reads:

> "we will outline the exceptional circumstances in terms of the later submission – not later than 12 August 2016 however we envisage to have NOA to be submitted to SARS within 2 weeks."

[14] Two weeks from 12 August 2016 would had fallen during the end of August 2016. Nevertheless, there was no Notice of Appeal filed by the applicant. This triggered enquiry on 12 September 2016 by Ms Z of the respondent as to when the applicant would be filing the Notice of appeal Response is as follows: “Dear Madam the ADR 2 was submitted on 22 August 2016” (003) ADR 2 is the notice of appeal (NOA.).”

[15] We need to be reminded that in this application the applicant’s submission is that a memorandum with its grounds of appeal “Annexed D” was filed on 22 July 2016. “Annexure D” has already been analysed in paragraph 12 above.

[16] In determining the relief sought by the applicant, the first question to be answered is whether the applicant filed notice of appeal as envisaged in rule 10(2). At page 10, in the 4th paragraph from the bottom of “Annexure C” the following is clearly stated:

> “You may appeal against this decision by completing the **prescribed** Notice of Appeal (NOA)form. (own emphasis).
>
> this The Notice of Appeal (NOA) form is obtainable electronically via, efiling. The NOA form is available on the SARS website….”

[17] The submision on behalf of the respondent is that the memorandum (“Annexure D”) sought to address grounds of appeal surfaced for the first time with the founding affidavit of this application. It is evident from the prescribed format above that the “Annexure D” does not comply.

[18] Above all respondent relies on the exchange of correspondence between parties to support the argument that the memorandum was never part of the document filed on 22 July 2016. This in particular the letter of 4 August 2016 written by Ms Z of the respondent to the applicant wherein she granted the applicant extension to file or have consideration for late filing for 25 August 2016. Therefore, it cannot be said that the memorandum was before respondent on 22 July 2016. To the above, the applicant’s response is that the applicant had requested extension on 4 July 2016, nevertheless on 16 July 2016 it managed to file NOA. This is done without informing the respondent.

[19] In Mr JT’s affidavit there are annexures submitted and accepted by SARS e-filing system. The first annexure is JPT 1 a screenshot of the “dispute workpage”, etc. As alluded above they are seen for the first time with the founding affidavit of this application. The applicant does not gainsay that.

[20] From the above I am inclined to believe the respondent ‘s version. In the event the NOA filed on 22 July 2016 had indeed contained the necessary as stipulated in rule 10(2) respondent would not had sent a reminder via Ms Z. Secondly the applicant would not had responded to Ms Z by saying the NOA was filed on 22 August 2016. The applicant’s stance that the NOA was filed with a memorandum on 16 July 2016 is at odds with the above undisputed evidence.

[21] The respondent correctly believed at all material times that the applicant failed to deliver a valid notice of appeal in the prescribed manner within 30 days after delivery of the notice of disallowance and or within the extended period granted by the respondent. The NOA form and attached documents uploaded on 22 July 2016 on the e-filing portal does not specify in detail grounds of appeal.

[22] From the above it is concluded that the respondent had shown good cause that it had never defaulted by not filing rule 31 statement, because there was no Notice of Appeal before it.

Order

[23] The application is dismissed with costs.

N.P. MALI

JUDGE OF THE HIGH COURT

Date of hearing : 18 August 2021

Date of Judgment : 19 November 2021