



**IN THE TAX COURT OF SOUTH AFRICA
(JOHANNESBURG)**

CASE NUMBER: 1132

DELETE WHICHEVER IS NOT APPLICABLE

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

In the matter between:

AB (PTY) LTD

Appellant

and

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

Respondent

Coram: WEPENER J ET G.N. JIYANE ET S. LUMKA – MEMBERS

Heard: 12 November 2014

Delivered: 18 November 2014

JUDGMENT

WEPENER J (G.N. JIYANE ET S. LUMKA CONCURRING):

- [1] The appellant is AB (Pty) Ltd, a company supplying security services to a number of its customers. The respondent is the Commissioner of the South African Revenue Services (the Commissioner), responsible for administering the provisions of the Value-Added Tax Act.¹
- [2] At a pre-trial conference, the parties agreed the common cause facts as follows:
4. The Appellant is registered for VAT purposes in terms of the Value-Added Tax Act, 89 of 1991 (“the Act”).
 5. During July 2012, the Respondent issued assessments against the Appellant, relating to the 02/07 to 02/11 Vat periods. The Appellant filed an objection which was partially allowed by the Respondent.
 6. In the revised assessments (resulting from the partial allowance of the Appellant’s objection), the Respondent disallowed the Appellant’s objection relating to overstated input VAT, additional tax, interest and penalties and revised the Appellant’s VAT liability.
 7. The Appellant is liable to the Respondent in terms of the revised assessments for payment of VAT in the amount of **R15,915,785.76** plus interest, 200% additional tax levied on the capital amounts and a 10% penalty imposed on the capital amounts.
 8. The Appellant has, in writing on 11 March 2013, abandoned its appeal against the capital amounts payable, and limits its appeal to the additional tax levied, penalties imposed and interest charged.

¹ Act 89 of 1991.

9. The amounts in dispute for the periods under assessment are as follows:

Additional tax	Penalties	Interest
R32,427,682.64	R1,621,484.12	R5,240,11.32

10. The reasons for the Respondent's assessments are set out hereunder.

11. During the audit of the Appellant's tax affairs it was detected that the Appellant had under-declared its output VAT. The Appellant was requested in writing on 25 April 2012 to furnish the Respondent with its explanations and supporting documents in respect of the differences in the reconciliations between the output VAT in the VAT control account and the VAT declared in the VAT 201 returns in respect of the 03/09 to 02/11 VAT periods. No explanations or supporting documents were provided.

12. The Respondent extracted summaries from the 2010 and 2011 VAT control accounts of input VAT entries that appeared to be incurred by the Appellant in respect of services or supplies. The Appellant was called upon in writing on 15 April 2012 to provide the Respondent with supporting documents in respect of the entries that it was not in agreement with. No supporting documentation was provided.

13. The Appellant was further requested to provide supporting documentation in respect of input VAT entries that were selected randomly from the 2010 and 2011 general ledgers VAT control accounts (Acc nr 9500/000). No supporting documentation was provided.

14. The Appellant was further requested to provide explanations in respect of the differences in the reconciliations between the input VAT in the VAT control account and the VAT 201 returns in respect of the 03/09 to 02/11 return periods.

15. The explanations provided by the Appellant in writing on 28 September were:

15.1 The Appellant was referred to the owner of C Entity Trade ('C Entity') to obtain a contract. As part of the agreement with C Entity and the Appellant, the former would be entitled to a commission.

15.2 C Entity would issue the Appellant with monthly invoices in respect of labour hire, commission and VAT. Further that labour hire was paid to the Appellant's employees and that commission and VAT was paid to the supplier.

15.3 The Appellant was requested in writing on 25 April 2012 to furnish the Respondent with copies of all the invoices that were issued by C Entity as well as proof of payment thereof. No supporting documentation, nor proof of payment was provided.

16. The Respondent, due to the failure of the Appellant to furnish it with any of the documentation mentioned above, raised additional tax of 200% as it rightly concluded that such failure on the part of the Appellant, constituted an intent by the Appellant to obtain an improper VAT refund with a view of defrauding the *fiscus*.

17. The Respondent, further, as a result of the non-payment of VAT timeously by the Appellant, imposed a 10% penalty on the capital amounts owed to it.

18. The Respondent, further, as a result of the non-payment of VAT timeously by the Appellant, levied interest on the capital amounts owed to it.

19. As stated above, the Appellant, on 11 March 2013 withdrew its appeal against the capital amounts, thus in essence concurring with the Respondent's audit findings.

20. In its letter addressed to the Respondent, dated 13 April 2013, the Appellant further states the following:

"Kindly take note that it was never our intention to defraud SARS and to evade the payment of any amount of tax payable.

We were under the impression that our auditor was handling all our tax affairs and we trusted his judgment as we do not have tax and accounting experience.

Please be lenient and waive the Additional Tax, penalty & interest as mentioned above and revised assessments."

21. . . .

22. The issues in dispute are the following:

22.1 Whether the Appellant is liable for additional tax in terms of section 60 of the Act.'

[3] Counsel appearing before this court were in agreement that the Commissioner had the duty to begin and has the onus to prove that the imposition of the additional tax of 200% was correctly imposed.

[4] The Commissioner elected to call one witness, Mr D, an auditor in its employ. Mr D testified regarding the imposition of the additional tax and why he recommended to the relevant decision making committees to impose 200% additional tax. I do not dwell on his recommendation as the committee to whom the recommendation was made further referred the matter to a more senior committee, the latter who took the decision to impose the additional tax of 200%. No witness was called to explain the decision of the senior committee. This failure results in this court being unable to assess the correctness of the decision of the committee to impose the penalty.

[5] Where the correctness of a discretionary decision, which is subject to objection and appeal, is contested in a tax court, there is a re-hearing of the whole matter, including the additional tax, by the tax court.² Accordingly, the tax court can consider the issue afresh and substitute the respondent's decision in that regard.³

[6] The Commissioner, having failed to place any evidence before the court as to how and why the senior committee arrived at a decision to impose the 200% additional tax, failed to prove that the imposition of the additional tax was justified and the imposition thereof cannot be upheld. This is more so by virtue of the fact that the Commissioner, at least impliedly, conceded that the imposition of the 200% additional tax was not justified by advising the court at the outset of the hearing that it no longer sought 200% additional tax but additional tax at the rate of 100%. Having made this concession, it was incumbent upon the Commissioner to lead evidence to show how this figure was arrived at. There is nothing before this court to determine the issue. In the circumstances, the Commissioner, who accepted the onus of proving that the penalty was correctly imposed, failed to discharge that onus.

[7] Having come to this conclusion, it is not necessary for this court to deal with the appellant's alternative argument that there are extenuating circumstances which would allow for the additional tax to be either remitted or reduced.

² See *Rand Ropes (Pty) Ltd v Commissioner for Inland Revenue* 1944 AD 142 at 150.

³ *CSARS v Foskor (Pty) Ltd* [2010] 3 All SA 594 (SCA) para 51.

[8] The following order is issued:

The additional tax imposed upon the Appellant is set aside. The assessment is referred back to the Commissioner and it is directed that the additional tax be remitted to nil.

Wepener J