

IN THE TAX COURT OF SOUTH AFRICA

(HELD IN DURBAN)

Case No: VAT 1237

In the matter between:

ABC (Pty) Ltd

Appellant

and

Commissioner for the South African Revenue Service

Respondent

Judgment

Lopes J

[1] This is an appeal against the disallowance of an objection against the decision by the Commissioner for the South African Revenue Service to impose interest on an unpaid amount of value-added tax, calculated from the 1st April 2010.

[2] The applicable legislation and the facts of this matter may be summarised as follows:

(a) In terms of the Value-Added Tax Act, 1991 ('the VAT Act') ABC (Pty) Ltd ('ABC') was required to make payment of its value-added tax obligations on

the 25th day of January, and on the 25th day of each alternate month thereafter.

- (b) If it failed to do so timeously, sub-s 39(1) of the VAT Act provided for the imposition of a penalty, and, where the value-added tax was paid after the end of the month during which it should have been paid, interest calculated from the first day of each such subsequent month or part thereof.
- (c) Where a penalty or interest was imposed, the taxpayer could in terms of sub-s 39(7) of the VAT Act, apply for remission of both the penalty and the interest.
- (d) In terms of s 39 of the Taxation Laws Second Amendment Act, 2009 (which came into effect on the 30th September 2009), the provisions of sub-s 39(7) of the VAT Act were amended. This amendment changed, from the 1st April 2010, the basis upon which the Commissioner could remit interest imposed in terms of sub-s 39(1) of the VAT Act, and applied to interest imposed on or after that date.
- (e) During December of 2009, the appellant, ABC (Pty) Ltd, concluded a purchase and sale agreement with D Co (Pty) Ltd ('D Co').
- (f) D Co paid ABC the sum of US \$3 950 000 for the assets purchased. This amount did not include value-added tax. D Co did not pay value-added tax on the transaction, as it had been advised, and believed, that the transaction qualified to be zero-rated for value-added tax purposes. Accordingly no value-added tax was paid by ABC to the Commissioner, and none was claimed by D Co as an input tax.

- (g) The two companies eventually accepted that value-added tax was payable on the sale and purchase of the assets, and ABC paid over the value-added tax to the Commissioner on the 9th November 2012. Thereafter D Co claimed the amount as an input tax credit.
- (h) It is common cause that the value-added tax should have been paid during the period ending on the 25th March 2010. As it was only paid on the 9th November 2012, the Commissioner imposed, in terms of sub-s 39(1)(a)(i) of the VAT Act, a penalty of ten per cent of the value-added tax and, in terms of sub-s 39(1)(a)(ii), interest on the amount of value-added tax calculated at the prescribed rate from the first day of the month following the month during which the value-added tax was liable to have been paid.
- (i) Accordingly, the Commissioner called upon ABC to pay the penalty and the interest of R938 927,78. The interest was calculated from the 1st April 2010 to the 9th November 2012.
- (j) Pursuant to representations made by ABC, the Commissioner agreed to remit the penalty. ABC also requested that the interest charged be remitted in terms of the unamended provisions of sub-s 39(7) of the VAT Act, which the Commissioner declined to do.
- (k) By way of a letter dated the 29th April 2013 the Commissioner disallowed the objection of ABC to his decision not to waive the interest. ABC now appeals against that decision.

[3] Sub-s 39(1)(a) provides:

‘If any person who is liable for the payment of tax and is required to make such payment in the manner prescribed in section 28(1), fails to pay any amount of such tax within the period for the

payment of such tax specified in the said provision he shall, in addition to such amount of tax, pay—

- (i) a penalty equal to 10 per cent of the said amount of tax; and
- (ii) where payment of the said amount of tax is made on or after the first day of the month following the month during which the period allowed for payment of the tax ended, interest on the said amount of tax, calculated at the prescribed rate (but subject to the provisions of section 45A) for each month or part of a month in the period reckoned from the said first day.'

[4] Prior to the 1st April 2010 sub-s 39(7) of the VAT Act provided:

'(7) To the extent that the Commissioner is satisfied that the failure on the part of the person concerned or any other person under the control or acting on behalf of that person to make payment of the tax within the period for payment contemplated in subsection (1)(a),(2), (3), (4), (6) or (6A) or on the date referred to in subsection (5), as the case may be—

- (a) (i) did, having regard to the output tax and input tax relating to the supply in respect of which interest is payable, not result in any financial loss (including any loss of interest) to the State; or
- (ii) such person did not benefit financially (taking interest into account) by not making such payment within the said period or on the said date,

he may remit, in whole or in part, the interest payable in terms of this section; or

...'

[5] In terms of sub-s 39(1) of the Taxation Laws Second Amendment Act, 2009 sub-s 39(7) of the VAT Act was, with effect from the 1st April 2010, substituted with the following:

'(7) Where the Commissioner is satisfied that the failure on the part of the person concerned or any other person under the control or acting on behalf of that person to make payment of the tax

within the period for payment contemplated in subsection (1)(a), (2), (3), (4), (6), (6A) or (8) or on the date referred to in subsection (5), as the case may be—

- (a) was due to circumstances beyond the control of the said person, he or she may remit, in whole or in part, the interest payable in terms of this section; or
- (b) was not due to an intent not to make payment or to postpone liability for the payment of the tax, he or she may remit, in whole or in part, any penalty payable in terms of this section.'

[6] At the commencement of the hearing Mr X, who appeared for ABC, and Ms Y SC, who appeared for the Commissioner together with Ms Z, recorded that both parties viewed the appeal as one involving only a matter of law. Accordingly, in terms of sub-s 118(3) of the Tax Administration Act, 2011, the matter proceeded before me alone.

[7] Mr X submitted that the issue was whether the decision by the Commissioner to remit the interest imposed by him, was to be decided in terms of the provisions of sub-s 39(7) of the VAT Act, prior to the amendment on the 1st April 2010, or the amended sub-s 39(7) which was to apply on or after the 1st April 2010.

[8] Mr X submitted that as the value-added tax in question was payable by no later than the 25th March 2010, the penalties and interest should be assessed from this date. He submitted however, that it was the practice of the Commissioner to charge interest only from the first day of the month following the month during which the value-added tax was payable. That, however, was not the date upon which the running of the interest began. That was determined by the date upon which the value-added tax would be paid (the 25th March 2010), and the interest would notionally start running on the day after that date. That being so, Mr X submitted that

the provisions of sub-s 39(7) of the VAT Act were applicable as they stood prior to the 1st April 2010.

[9] Mr X stressed that the Commissioner, in deciding whether interest should or should not be remitted, should only consider one set of facts – i.e. those existing at the time the value-added tax was to have been paid on the 25th March 2010. Having applied his mind, the Commissioner should then have reached a decision based on the law at that time. As the decision on which the Commissioner ultimately based his decision was the law on or after the 1st April 2010, he did so incorrectly.

[10] Mr X submitted in the alternative, that if that I was to find that the amended provisions were applicable, the first VAT period in respect of which the interest could be 'imposed' would be for the first due date for VAT periods after the 1st April 2010. The next VAT payment date was the 25th June 2010. The amended remission criteria could then only apply from the 1st July 2010. Since interest had been imposed for periods prior to the 1st July 2010, the provisions prior to the amendment applied to ABC.

[11] Ms Y submitted that in terms of sub-s 39(2) of the Taxation Laws Second Amendment Act, 2009, the new sub-s 39(7) of the VAT Act came into operation on the 1st April 2010, and applied to interest imposed in terms of s 39(1)(a)(ii) of the VAT Act on or after that date. In this matter the VAT was payable on the 25th March 2010. It was in fact paid on the 9th October 2012. In terms of sub-s 39(1)(a)(ii), interest could only be imposed on or after the first day of the month following the 25th March 2010 – i.e. on the 1st April 2010, which was also the date upon which the amended sub-s 39(7) came into effect.

[12] Ms Y accordingly submitted that it is significant that the legislature dealt differently with a penalty for the late payment of the value-added tax, as opposed to any interest thereon. The penalty would apply immediately upon the late payment of the value-added tax – i.e. on the 26th March 2010 in this case. Interest, however, is regulated under a different regime. If the interest is paid on or later than the first day of the month following the month during which the tax was due, then interest would be imposed from the first day of that month. In this case that was the 1st April 2010.

[13] Ms Y submitted that the date from which interest was to run was not a matter regulated by a practice directive of the Commissioner, but by statute. Sub-s 39(1)(a)(ii) fixed the date from which interest was to run – viz. the 1st April 2010. Coincidentally, this date was the date from which the amended provisions of sub-s 39(7) concerning remission came into effect.

[14] In litigating for the imposition of interest, the legislature provided the taxpayer with what may be viewed as an indulgence not to have to pay interest for the period between the date upon which the value-added tax was paid and the end of that month. Thereafter the taxpayer is required to pay interest. The payment of interest is triggered by the non-payment of the value-added tax, and continues on a monthly basis until the value-added tax is paid.

[15] In all the circumstances I am of the view that the interpretation contended for by Ms Y is the correct one. Interest was imposed in terms of s 39(1)(a)(ii) on the first day of the month following the month during which the value-added tax was payable. The basis upon which that interest could be remitted was amended, and also came into operation on the 1st April 2010 and applied to interest imposed on or after that

date. There can be no doubt then that any possible remission of the interest imposed on the 1st April 2010, could only be considered by the Commissioner on the basis of the amended provisions applying on that date. That being so, the main and alternative arguments for ABC must fail.

[16] There was some debate at the end of the argument by counsel as to the form of the relief which is to be granted. Ms Y submitted that if I was of the view that the amended legislation prevailed, then the appeal should simply be dismissed. Mr X submitted that in such an event the matter should be remitted to the Commissioner because ABC had not had an opportunity to consider and react to the Commissioner's assessment of the amended provisions of sub-s 39(7). Each party appeared to believe that both sides had agreed to the proposal they put forward. I am obviously unable to resolve that dispute between the parties and I accordingly make a decision which is least prejudicial to the taxpayer.

[17] In all the circumstances I rule that the provisions of s 39(7)(a) as substituted by s 39(2) of the Taxation Laws Second Amendment Act, 2009 were applicable on and from the 1st April 2010, regarding any consideration of the remission of the interest imposed.

[18] Ms Y submitted that the costs should follow the result, and that the attitude of ABC to the interpretation of the VAT Act and the Taxation Laws Second Amendment Act, 2009 was unreasonable. In my view the submissions advanced on behalf of the appellant were not unreasonable. Each party should therefore pay its own costs.

[19] I accordingly make the following order:

- (a) the provisions of sub-s 39(7) of the Value-Added Tax Act, 1991, as amended by s 39 of the Taxation Laws Second Amendment Act, 2009 are applicable to any consideration of the remission of the interest imposed in this matter by the Commissioner on the appellant in terms of sub-s 39(1)(a)(ii) of the Value-Added Tax Act, 1991;
- (b) each party is to pay its own costs.

Date of hearing: 14th March 2016.

Date of judgment: 24th March 2016.