

REPUBLIC OF SOUTH AFRICA

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

CASE NO: **0018/2016**

In the matter between:

ABC (PTY) LTD

APPLICANT

and

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

RESPONDENT

J U D G M E N T

MASIPA, J:

INTRODUCTION

[1] This is an interlocutory application in which the applicant, (“ABC”), seeks condonation for the late filing of an appeal against the assessment issued by the respondent, (“SARS”), against it in respect of the 2012 year of assessment. A copy of the notice of appeal, (“NOA”), that the applicant seeks to file, is annexed to the applicant’s papers and marked “Z1”.

[2] The application is opposed.

BACKGROUND

- [3] ABC conducts business as a property owning company and receives its income from letting property. During 2013, SARS conducted an audit of ABC business. As a result SARS raised an assessment for the 2012 year of assessment. The audit resulted in SARS issuing an additional assessment in the sum of R1 208 919.44 increased from the original assessment issued on 27 February 2013 in the sum of R19 915.27.
- [4] On 7 October 2013 ABC made an objection against the assessment. A copy of the notice of objection, together with substantiating reasons, is annexed to ABC's papers and marked "Z4". In the notice of objection, reference is made to various annexures which were made available to SARS in hard copy. According to ABC these annexures comprised of two arch lever files which were delivered, by the deponent to the founding affidavit, to SARS's Alberton office, on 7 October 2013.
- [5] The deponent to the founding affidavit is Mr X, a chartered accountant, who is registered as such. In addition he is registered with SARS. In the founding affidavit he sets out the circumstances which led to the present application.
- [6] On 8 November 2013, SARS partially allowed the objection against the applicant's assessment for the 2012 year of assessment. According to Mr X on 9 December 2013 he uploaded on SARS's e filing the required NOA form, together with supporting documentation, noting an appeal against the disallowance concerned. On uploading the appeal, Mr X made a copy of NOA form and retained a hard copy on the applicant's file. On the hard copy he made the following note in manuscript: "ADSL ... repaired faulty line 6.12.2013".

- [7] Mr X states in his affidavit that ADSL lines had been disrupted, in the neighbourhood where he conducts business, as the ADSL lines had worked intermittently in the first two weeks of December 2013.
- [8] Mr X waited until 30 June 2014 before he made enquiries about the progress of the appeal. He took this long, he says, for in his experience, SARS often took some time to deal with appeals, sometimes past the prescribed period in terms of the Rules, up to a period of nine months. He was then informed that SARS had no record of the appeal. On 2 July 2014, Mr X spoke to Mrs T, the objection and appeals compliance officer at SARS, Alberton branch, who advised him that he should file a further notice of appeal and request condonation. He did as advised and, as the basis of the condonation application, he cited the non-functionality of the ADSL line.
- [9] On 10 February 2015, SARS refused to grant condonation as the appeal was filed out of time in terms of the Rules of Court. Mr X states that this notification did not come to his attention until 20 June 2015 as it had been sent to the previous tax practitioner acting on behalf of the applicant and not to the address noted in the notice of appeal, as is required by the Rules of Court.
- [10] Mr X again spoke to Mrs T who advised that a further notice of appeal should be filed. On 23 June 2015 Mr X filed a further notice of appeal. On 13 July 2015, SARS legal adviser at Megawatt Park, addressed an email to Mr X informing him that condonation would not be granted. The body of the email, marked "Z9", reads as follows:
1. We refer to your notice of appeal ("NOA") dated 02 July 2014.
 1. Kindly note that under section 107(1) of the Tax Administration Act 28 of 2011 ('TA Act') a taxpayer may appeal against the assessment or

decision in the objection in the manner and within the period prescribed under the rules.

2. Under Rule 10(1)(a) of the above mentioned rules, a tax payer who wishes to appeal must within 30 days of the delivery of the notice of disallowance of the objection, lodge with SARS the NOA1 as prescribed.
3. Section 107(2)(a) or (b) of the TA Act provides that a senior SARS official may extend the period within which an appeal must be lodged up to 51 days if reasonable grounds exist for the delay or up to 75 days if exceptional grounds exist for the delay. No discretion is provided to SARS to extend the period beyond the 75 days.
4. In other words, you have 30 days to lodge an appeal which may only be extended by 21 days or up to 45 days provided that reasonable or exceptional grounds exist respectively for the delay.
5. We note that according to our records the notice of appeal was delivered on the 02 July 2014 after the disallowance was sent on the 7 November 2013. The appeal has, therefore, been lodged more than 75 days after the date of disallowance of the objection, and SARS has no discretion herein.
6. Having regard to the above, we have proceeded to invalidate the appeal and accordingly regard the matter as finalised.

[11] Subsequently the appellant launched the present appeal.

THE GROUNDS OF OPPOSITION

[12] None of the facts set out in the founding affidavit is contradicted by the respondent. In its response the deponent to the affidavit by SARS specifically states that he has no knowledge of many of the assertions made on behalf of the ABC and merely notes them. SARS rejects the explanation given on

behalf of ABC as insufficient but placed no evidence before this court to show that the version of the applicant was unacceptable.

[13] The respondent contended that the application has no merit. Inter alia, it also criticized the fact that the deponent to the founding affidavit did not indicate on the Notice of Motion and Founding Affidavit under what law or authority the applicant sought relief from this court. In my view this is not a requirement. This court is empowered to regulate its own process and may hear and decide interlocutory applications in procedural matters relating to a dispute and as provided for in the Rules of the Tax Court, (Tax Administration Act, section 117).

[14] The main reason, however, that SARS advances why it is not prepared to grant condonation is set out in “Z9”, where it states that Section 107 of the Tax Administration Act 28 of 2011 curtails its power to come to the assistance of the applicant.

[15] Section 107(2) of the Tax Administration Act 28 of 2011 (TAA) states:

(2) A senior SARS official may extend the period within which an appeal must be lodged for—

- (a) 21 business days, if satisfied that reasonable grounds exist for the delay; or
- (b) up to 45 business days, if exceptional circumstances exist that justify an extension beyond 21 business days.

[16] On behalf of ABC it was submitted that the only reasonable interpretation of section 107(2) is that the time period referred to in the section must be calculated from the date of the request or the discretion given by legislation would be rendered meaningless. This would be so especially in

circumstances, like the present, where the taxpayer only became aware of the fact that the appeal had in fact not been served, in the prescribed manner, after 75 days had passed.

[17] SARS, on the other hand, interprets this section to mean that it may only extend the time period granted under the Rules of 30 days by a further 21 days, thus 51 days in all where there are reasonable grounds and a further period of 45 days, that is, 75 days, if there are exceptional grounds.

[18] In this interpretation SARS fails to take into account that there may be cases where, a taxpayer, is either unaware of the disallowance of the objection, or that its notice of appeal was not filed in the manner as required by SARS in terms of the legislation. It would not make sense to expect a party who is unaware of its failure or that an administrative action has been taken against it, to invoke its internal administrative remedies to resolve a dispute with an organ of state.

[19] Nowhere in the section does it specifically say from when the SARS official may extend the time frame. It seems to me from the wording of this section, that the empowering provisions grant to a senior SARS official the power to extend the time frame in which an appeal is to be lodged for a further 21 days from the date of the request where the senior SARS official is satisfied that reasonable grounds exist and 45 days if the senior SARS official is satisfied that exceptional grounds exist. In my view any other interpretation would be absurd for precisely the reasons submitted on behalf of ABC.

[20] In any event, in condonation applications a delay cannot be the determining factor. (See *Ferris v First Rand Bank Ltd* 2014(3) SA 39 (CC) at 43G–44A).

There are other equally important considerations to be taken into account namely; whether or not the omission or failure was due to the fault of the applicant; the extent of the delay and steps, if any, taken by the applicant as soon as it became apparent that there was failure to comply with the Rules and whether or not condonation in a particular case would prejudice the respondent. There must also be reasonable prospects of success on appeal.

[21] In the present case the late filing of the appeal notice was not an omission or failure on ABC's part. In his affidavit Mr X states that he, acting on ABC's instructions, uploaded the notice of appeal on SARS's e-filing platform on 9 December 2013. According to Mr X this notice was filed on the 21st day, that is, within the 30 day period allowed by Rule 10 to file a notice of appeal.

[22] It later transpired that the notice of appeal was not recorded on the SARS e-filing platform as having been filed, but only saved. Mr X gave an explanation when he requested condonation from SARS, which condonation was refused. The neighbourhood where he conducts business had experienced disruption in the Telkom telephone lines as a result of waterlogged ADSL cable at the time the notice of appeal was loaded on SARS's e-filing platform. Two days, after Mr X became aware that the appeal had not been filed, he filed a further notice of appeal.

[23] Furthermore there appears to be reasonable prospects of success on appeal. I say this because in disallowing the objection SARS merely recorded: "disallowed in terms of section 11(a) read with section 102 TAA" and relied on the reverse onus.

[24] Counsel for ABC, correctly submitted, that SARS had failed in its administrative duties as it furnished no reasons for disallowing the objection.

SARS had provided no reasons why it did not consider the documentation which was provided to it as sufficient proof why deductions should be allowed. Nowhere does SARS specify what supporting documents it accepted and what documents it rejected and the reasons thereof. SARS is legally obliged to consider supporting documentation tendered to it by a tax payer so as to arrive at a decision. (See *The Commissioner for the South African Revenue Service v Pretoria West Motors* 2014(5) SA 231 SCA.)

[25] In the present case the fact that SARS failed to consider certain documentation without tendering any explanation is a strong indication that there are good prospects of success on appeal.

[26] Lastly I can see no prejudice to the respondent if condonation is granted. The notice of appeal and substantiating documents have been available to SARS since December 2014 on the applicant's e-filing profile. On the other hand I think there would be great prejudice to the applicant if condonation were to be refused. The applicant's case would be closed without the court having had the opportunity to deal with the merits.

CONCLUSION

[27] Counsel for the respondent argued that the explanation offered for the delay was implausible and should be rejected. I disagree with this submission. In my view, an acceptable explanation for the delay was given and reasonable prospects of success on the merits were provided in the applicant's founding papers. In addition the delay was not due to the fault of the applicant.

[28] Having regard to the facts and circumstances of this case it seems to me that this is one of those cases where condonation should be granted.

[29] In the result I grant the following order:

1. The applicant, ABC, is granted leave to file its notice of appeal against the disallowance of the objection for the 2012 year of assessment.
2. The applicant's notice of appeal for the 2012 year of assessment is to be filed within 10 days of the granting of this order.
3. The respondent, (SARS), is ordered pay costs.

T M MASIPA

JUDGE OF THE HIGH COURT IN SOUTH AFRICA

GAUTENG LOCAL DIVISION (JOHANNESBURG)

COUNSEL FOR THE APPLICANT: C DREYER

INSTRUCTED BY: PIERRE RETIEF INC. ATTORNEYS

DATE OF HEARING: 29/8/2016

DATE OF JUDGMENT: 27/1/2017