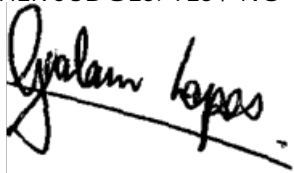


REPUBLIC OF SOUTH AFRICA



IN THE TAX COURT OF SOUTH AFRICA
(HELD AT DURBAN)

CASE NO.: 13796

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
6 September 2019	
DATE	SIGNATURE

In the matter between:

PM

APPELLANT

and

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

RESPONDENT

J U D G M E N T

LOPES J

[1] In this application, the appellant, PM, seeks leave to amend his grounds of appeal dated 2015 (“the 2015 grounds”). The application is brought in terms of rules 35(2) and 52(7) of the Tax Court Rules. The respondent, the Commissioner for the South African Revenue Service opposes the application on the following grounds:

- (a) The procedure used by the appellant is inappropriate.
- (b) That various factual statements have been changed and admissions are withdrawn in the proposed amended grounds of appeal (“the amended grounds”), without any explanation.
- (c) A new ground of appeal, the “Incorrect Taxpayer” defence is included in the amended grounds, contrary to the provisions of rule 32(3).
- (d) The proposed new ground is excipiable.

The procedure used

[2] In his amendment application, the appellant did not set out each of the amendments proposed. Instead, he chose to amend his 2015 grounds by substituting a new document. As the 2015 grounds consisted of 37 typed pages (together with 38 pages of annexures), and the amended grounds of 31 pages (together with 38 pages of annexures) it became necessary for anyone who wished to understand the amendments, to read very carefully through both drafts, in order to be certain as to what exactly was changed.

[3] In my view, this approach is procedurally impermissible. An appellant wishing to amend their grounds of appeal should set out sequentially each amendment sought to be made. Doing so will enable the reader clearly to understand which grounds are being amended, and how. No respondent should be required to troll through and compare the two documents, having to read some one hundred and forty-four pages just to be able to discern the nature of the amendments.

[4] A reading of the two drafts side by side soon reveals that there are numerous amendments which were made, including the alteration of factual allegations and the withdrawal of a number of admissions. This complicated and lengthened the hearing of the application because of the need to cross-reference the numerous amendments, and deal with each one. However, to deny the application on the ground of a procedural irregularity alone would, no doubt, provoke the suggestion of denying the appellant due process. What is particularly disturbing is that in the founding affidavit to lead the amendments, the appellant contends that he seeks to raise a new ground of appeal, being the “Incorrect Taxpayer” ground, which is set out in some detail. No other proposed amendments are dealt with in the

founding affidavit. Somewhat disingenuously, no reference whatsoever is made to the various factual alterations and withdrawals of admissions.

The altered facts/withdrawn admissions

[5] In the absence of consent by the respondent, and as no attempt whatsoever was made to draw attention to the factual alterations and withdrawals of admissions, and no justification or supporting documentation was given for them, I would normally have disallowed them. I set out below those amendments for the purposes of clarity and the proper determination of costs. They include:

- (a) Paragraphs five, six, seven and eight of the amended grounds replace the old paragraph six. In the new paragraph five the period of the appellant's sequestration is altered to be from the 11th June 2001 to the 3rd July 2009 (amended from September 2002 to September 2009).
- (b) In the amended grounds, paragraph six contains the addition:

"The funds were paid into a loan account in 'Account A' for the benefit of the appellant. ('the movement of funds')".
- (c) In the amended grounds, paragraph eight states that the appellant's sequestration was in the 2002 tax year, as opposed to the 2003 tax year referred to in paragraph eight of the 2015 grounds.
- (d) In paragraph nine of the amended grounds, the words "with the assistance of the appellant" in the 2015 grounds have been omitted from the first sentence. This relates to the family contributing time and energy in managing the businesses formed.
- (e) In the last sentence of paragraph 9 of the amended grounds, reference is made to funding being made available to the appellant, but the words "in the manner described herein by the Appellant" in paragraph nine of the 2015 grounds, are omitted.
- (f) In paragraph 10 of the amended grounds, it adds the allegation that the appellant received funds during the period for which the respondent raised the assessments during the period of his sequestration, by way of loans from AA, AB and family members or other third parties.
- (g) Paragraph 11 of the amended grounds omits the statement that "his experience and acumen has been extensively relied upon to form the businesses and to assist in obtaining further business allowing the continued expansion of operations", which was contained in the 2015 grounds.

- (h) In paragraph 11 of the amended grounds, the words “in ‘Account A’ ” are added at the end of the first sentence. Those words do not appear in the equivalent paragraph 12 of the 2015 grounds.
- (i) Paragraph 15 of the 2015 grounds recorded that “the Respondent’s (Sic) current Accountant was only appointed in 2012”. Paragraph 15 of the amended grounds record that the “the Appellant’s previous tax practitioner and accounting officer of related parties was only appointed in May 2012”.
- (j) In paragraph 16 of the amended grounds, the reference in the 2015 grounds to “the Respondent’s (Sic) accountant ...” has been replaced with “the Appellant’s tax practitioner ...”.
- (k) In paragraph 18 of the amended grounds, the reference in the 2015 grounds to the “Appellant’s accountant” is replaced with a reference to “the Appellant’s tax practitioner”.
- (l) In paragraph 22 of the amended grounds, a new submission is made stating:

“For the reasons set out hereunder, we submit that the appeal pertains to two distinct tax periods viz the 2007 to that portion of 2010 tax period as relates to the period 1 March 2009 up to and including 3 July 2009 tax period (‘the first tax period’) and the 2010-2011 (‘the second tax period’). The Appellant raises a point *in limine* regarding the first tax period as set out hereunder.”

That was not contained in the 2015 grounds.
- (m) Paragraphs 24 and 25 of the amended grounds are duplicated and appear to be a repetition of the 2015 grounds, paragraph 24.
- (n) Paragraphs 37 to 46 of the amended grounds introduce the new ground of appeal, the “Incorrect Taxpayer”. That ground of appeal was not contained in the 2015 grounds.
- (o) In paragraph 53.4.2 of the amended grounds the appellant refers again to the “Incorrect Taxpayer” defence, which was not raised in the equivalent paragraph 43.4.2 of the 2015 grounds.
- (p) Paragraph 59.8 of the 2015 grounds simply denied that the appellant had a personal bank account “during the relevant period”. The amended grounds “... deny that the Appellant had a personal bank account during the 2007, 2008, 2009 from 1 March 2009 to 3 July 2009 ...”.
- (q) In paragraph 49.11 of the 2015 grounds, the appellant admitted the contents of paragraph 14 of the respondent’s statement of grounds of assessment. In paragraph 59.11 of the amended grounds the contents of paragraph 14 are noted.

- (r) In the amended grounds, paragraph 59.12 also seeks to amend the date on which the appellant was sequestered and refers to various tax periods.
- (s) The 2015 grounds merely “notes” the allegations in paragraph 26 of the respondent’s grounds of assessment, but they are denied in the amended grounds, at paragraph 59.19.

[4] The above analysis of the amendments ignores changes where: necessary corrections were made regarding the identity of the appellant or the respondent; paragraphs were moved around or changed to refer to other paragraphs; corrections of law regarding applicable sections, etc were made; and omissions of defences were made.

[5] With regard to the annexures to the amended grounds there appears to be a page missing – i.e., annexure “D” (at page 192 of the dossier), which referred to payments considered to be donations for the 2007 tax year. If I am correct in this assumption there would obviously be no prejudice to the respondent if the appellant merely omitted that annexure in error. It may accordingly be added.

The submissions

[6] Mr E, who appeared for the appellant, submitted that although the “Incorrect Taxpayer” defence was not specifically raised initially, the substance of it was contained in the appellant’s previous allegations that during his insolvency, he was in a position where he could not generate an income in his own name. Mr E also referred to the respondent’s objection on the basis of form over substance. He submitted that the appellant’s erstwhile attorneys should have dealt with the defence that, with regard to income earned by the appellant during the period of his insolvency, the correct taxpayer was the trustee of his insolvent state. Mr E submitted that, that was why the appellant had not set out the “Incorrect Taxpayer” defence in his 2015 grounds of appeal.

[7] Mr E submitted that the appellant’s insolvent estate and the appellant himself constituted one legal persona, and the introduction of the defence by way of amendment would give greater clarity to the appeal. Mr E submitted that on the basis that the facts have always been known to the respondent, the appellant would be prejudiced if the amendments are not granted. They should also be allowed because they would occasion no injustice to the respondent which could not be dealt with by an order for costs.

[8] With regard to funds which accrued to the appellant during the period of his insolvency, the appellant maintains that the funds were in any event loans. Those monies which were obtained by the appellant for his personal support would not have affected his estate and did not in any way endanger his insolvent estate. Mr E also submitted that although rule 32(2)

provides that the statement of grounds of appeal of an appellant must set out the material facts and legal grounds upon which the appellant relies for the appeal and opposing the facts or legal grounds in the statement from the respondent under rule 31, rule 32(3) appears to be contradicted by the provisions of rules 10(3) and 10(4).

[9] Mr Kebbar SC, who appeared for the respondent submitted that ultimately, the respondent only objected to the following amendments:

- (a) Those paragraphs in the amended grounds of appeal which seek to replace the identity of the appellant's accountant with that of the appellant's tax practitioner.
- (b) The deletion of the second sentence in paragraph 10 of the 2015 grounds of appeal.
- (c) The deletion in paragraph 11 of the amended grounds of the words "including remuneration, as an insolvent, for the years in which they contributed their time and energy in managing the business with the assistance of the Appellant".
- (d) The "Incorrect Taxpayer" defence.

[10] Mr Kebbar submitted that as the appellant did not profess to be conducting business during his insolvency as a general trader, he did not need the authority of his trustee to generate an income. Mr Kebbar pointed out that even had the appellant conducted a business or profession, his new income would not have been taxable in the hands of the trustee of his estate. He relied upon section 23(9) of the Insolvency Act, 1936, which reads:

“(9) Subject to the provisions of subsection (5) the insolvent may recover for his own benefit, the remuneration or reward for work done or for professional services rendered by or on his behalf after the sequestration of his estate.”

Mr Kebbar submitted in those circumstances the appellant was liable to pay tax on any income which he generated during the period of his insolvency. This formed part of the appellant's new estate and did not affect the tax liability of the insolvent estate. The only obligation upon his trustee was to recover any monies in excess of those of which the appellant required for his own support and that of his dependants. Any such monies which were recovered by the trustee would in any event have consisted of after-tax income.

[11] In addition, Mr Kebbar pointed out that the appellant had submitted tax returns for the 2007-2009 tax years under his own tax number, his notice of objection was submitted under that tax number, and that this defence had never been raised in his objections delivered in terms of rule 7.

[12] Mr Kebbar's answer to the submission regarding rules 31 and 10 was that rule 10(3) provides that "a taxpayer may not appeal on a ground that constitutes a new objection against a part or amount of the disputed assessment not objected to under rule 7". He submitted that although rule 10(4) provides that if the taxpayer in a notice of appeal relies on a ground not raised in the objection under rule 7, the respondent may require the taxpayer within 15 days after delivery of the notice of appeal, to produce the substantiating documents necessary to decide on the further progress of the appeal. Mr Kebbar submitted that these provisions are not inconsistent with the provisions of rule 32(3) because the respondent has the right to waive the barrier to a new objection, but nevertheless require the documents to establish it.

Reasoning

[13] In my view, once the estate of a person has been placed into insolvency, an insolvent is entitled to begin generating a new estate. The limitations on an insolvent from doing so are set out in section 23 of the Insolvency Act, 1936, as amended, and the appellant does not suggest that any such grounds were applicable to him. When he generated an income in his new estate, he became personally liable to pay any tax raised on that new estate. It is not clear to me on what basis the trustee of the appellant's estate would have had the responsibility for rendering tax documents and making payments of tax with regard to the income of the appellant's new estate.

[14] Section 1 of the Income Tax Act, 1962 was amended in 1997 to include in the definition of a "representative taxpayer", the trustee of an insolvent estate with regard to income received by or accrued to an insolvent estate. That, however, does not relate to income earned by an insolvent after his insolvency. See section 25C of the Income Tax Act, 1962.

[15] With regard to the interpretation of rules 10(3) and 32(3), they refer, in similar terms to the fact that a taxpayer/appellant may not appeal on a new ground of objection against a part or amount of the disputed assessment which was not objected to by the taxpayer/appellant under rule 7. The interpretation of these rules was dealt with by Keightley J, in Income Tax Case No 1912 (2018) 80 SAIC 417. I am in respectful agreement with his views. Thus, although the appellant may be entitled to raise a new ground of appeal in his proposed amendment, it must relate to an objection to a part, or amount of his disputed amendment which was included under rule 7. If it was not raised in his objections under rule 7, he may not do so by amendment. In addition, however, it must constitute a ground of appeal which is sustainable in law. If the additional ground of objection was raised in his rule 7 notice, it was done so very obliquely. Even if it may be considered to have been raised, for the reasons set forth above, I am of the view that the "Incorrect Taxpayer" ground does not disclose a defence in law, and the amended ground of appeal is disallowed.

[16] With regard to costs, I have borne in mind the manner in which the appellant sought to amend his grounds of appeal as set out above. In addition, the main purpose of the amendment (the “Incorrect Taxpayer” defence) is without merit insofar as it relates to the trustee of his insolvent estate constituting the correct taxpayer for income earned after the date of the appellant’s insolvency. The amendment was properly objected to by the respondent and the conduct of the appellant warrants an order for costs on a punitive scale.

[17] In the circumstances I make the following order:

(1) The appellant is granted leave, by consent between the parties, to amend his Statement of Grounds of Appeal in terms of rule 32 within five days of the date of this order. The amended grounds of appeal shall be as per annexure “FA1” to his application, save that the following amendments are denied:

(a) the omission from the amended grounds, paragraph 9, of the words: “with the assistance of the Appellant”.

Those words are to be inserted in paragraph 9 of the amended grounds after the words in the second sentence thereof: “in managing the business”.

(b) the omission from paragraph 14 of the amended grounds of the words: “His experience and acumen has been extensively relied upon to form the businesses and to assist in obtaining further business allowing the continued expansion of operations.”

Those words are to be inserted at the end of paragraph 14 of the amended grounds.

(c) the amendment of the reference to “current Accountant”, “accountant” and “Appellant’s accountant” in paragraphs 15, 16 and 18 of the 2015 grounds of appeal and the insertion of the words:

(i) “previous tax practitioner and accounting officer of related parties” (paragraph 15);


(ii) “tax practitioner” (paragraph 16); and

(iii) “tax practitioner” (paragraph 18).

The original wording of paragraphs 15, 16 and 18 of the 2015 grounds of appeal as set out in this order are to remain in the amended grounds.

(d) paragraphs 37 to 46 of the amended grounds.

- (2) The appellant is to pay the respondent's costs of the application to amend the grounds of appeal, such costs to include those consequent upon the employment of two counsel and are to be calculated on the scale as between attorney and client.

A handwritten signature in black ink, appearing to read "J. Lopes", written over a horizontal line.

Lopes J

Dates of hearing : 7 August 2019

Date of judgment : 6 September 2019