

REPUBLIC OF SOUTH AFRICA



**IN THE TAX COURT OF SOUTH AFRICA
(HELD AT MEGAWATT PARK, JOHANNESBURG)**

CASE NO: 35476

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
.....	23 August 2022
SIGNATURE	DATE

In the matter between:

AB

Appellant

and

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

Respondent

J U D G M E N T

Manoim J

Introduction

[1] The appellant AB, who is the taxpayer in this matter, has appealed to this court against additional assessments levelled against him by the respondent (hereinafter SARS) in respect of the 2014, 2015, 2016 and 2017 tax years.

[2] I am not deciding this appeal. The appeal hearing has not yet commenced. What I have been called upon to decide is a point in *limine* raised by SARS that the matter be referred back to the Commissioner for reconsideration and assessment. The taxpayer opposes the point in *limine*. Both parties agree on one point – the referral back at this stage of proceedings is unique and neither could point to a case where such a request had been made and decided on. There are cases where in the course of hearing an appeal a court has made such a referral, but not in deciding a point in *limine* before the hearing has commenced.

Nature of the dispute

[3] The taxpayer is a shareholder in several companies which loan money to one another. Central to this case is the loan account in one of his companies called Holdings (Pty) Ltd. In an unaudited financial statement for 2014 the taxpayer's loan account was recorded as amounting to R30 179 163. The taxpayer contends that this amount is incorrect, and the financial statements have since been rewritten to correct this. The reason the taxpayer advances for the error is explained in this way in his counsel's heads of argument:

"This amount included interest bearing borrowings payable by Holdings (Pty) Ltd to financial institutions (Standard Bank of South Africa Limited and Nedbank Limited) in the sum of R20 283 978, which included interest payable by Holdings (Pty) Ltd to these financial institutions that had been capitalised. The correct value is R10 390 949."

[4] SARS is skeptical of this version since it is based on an error in the preparation of the financial statements. It queries how this error went undetected for more than five years. It alleges that the taxpayer gave it three different versions during what is known as the objection and appeal process. Then a fourth version was proffered after the appeal was lodged. But says SARS the fourth version was only given to it during the Alternative Dispute Resolution process in 2019, but not during the earlier objection and appeal process. This means, says SARS, it was unable to investigate the material as part of the objection and appeal process. As such says SARS the second version of the Revised Financial statements "... was not considered, was not heard by SARS". For this reason SARS wants the matter to be referred back to SARS for further examination and assessment. What this means practically is that SARS would conduct a further

audit of the companies in the AB group and other related companies for the purpose of determining the taxpayer's liability. The taxpayer objects to this re-opening of a further audit of his affairs a process which in any event is likely to take several months.¹

[5] The taxpayer maintains that all the material that SARS would need to consider is before the court as part of the record forming the appeal. It objects to the relief sought by SARS on the basis that it is not competent for such relief in the Act. The only way the matter could be referred back to SARS is if the court hearing the appeal decides that it is necessary to do so.

[6] SARS argues that the court has this power in terms of section 129(2)(c) of the Tax Administration Act 28 of 2011 (TAA). To consider this argument it is necessary to consider the structure of section 129 as whole.

“129 Decision by tax court

(1) The tax court, after hearing the ‘appellant’s’ appeal lodged under section 107 against an assessment or ‘decision’, must decide the matter on the basis that the burden of proof as described in section 102 is upon the taxpayer.

(2) In the case of an assessment or ‘decision’ under appeal or an application in a procedural matter referred to in section 117 (3), the tax court may—

- (a) confirm the assessment or ‘decision’;
- (b) order the assessment or ‘decision’ to be altered;
- (c) refer the assessment back to SARS for further examination and assessment; or
- (d) make an appropriate order in a procedural matter.”

(My emphasis)

[7] This section then needs to be read with section 117(3) of the TAA which states:

“117 Jurisdiction of tax court

(3) The court may hear and decide an interlocutory application or an application in a procedural matter relating to a dispute under this Chapter as provided for in the ‘rules.’”

¹ This can be gathered from a draft order prepared by SARS which sets out the time periods for compliance by both parties if the relief it seeks is granted.

[8] The taxpayer has argued that on a proper reading of section 129 the court can only give such referral relief in terms of section 129(c) after hearing the appellants' appeal. Since the appeal in this case has not yet been heard the court has no power to give the relief sought.

[9] SARS argues that it is not seeking final relief and hence the alternative in section 129(c) the reference to section 117(3) applies. It is an interim order because whatever decision SARS makes is not final as it can be appealed against. The taxpayer argues that it is final as when SARS makes a new assessment that decision is final in nature. I agree with this argument. Whilst case law on what constitutes final relief has developed over the years a recent case of *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service*² is apposite in these circumstances. The court held that where an interim order is intended to have an immediate effect and will not be reconsidered on the same facts in the main proceedings, it will generally be final in effect.

[10] If the investigation is referred back to SARS leading to a revised assessment it would have an immediate effect on the taxpayer and would not be reconsidered by SARS during its proceedings. In that sense the taxpayer is correct. The nature of the relief sought by SARS is final in effect.

[11] Thus, for this reason alone the point in *limine* cannot succeed under section 129(c). But there is a further problem with the point in *limine*. Although SARS contends there are no disputes of fact this is denied by the taxpayer. Since technically we do not have pleadings in the sense that this is normally understood it is difficult to determine the law point on the basis of a disputed record. This may explain why there is no case law that either party could refer me to on this point in relation to section 129.

[12] The case I was referred to by both was the case of *Commissioner of the South African Revenue Service v Stepney Investments (Pty) Ltd*³. In that case the issue was whether the court had sufficient facts before it in relation to a valuation. The court found that there were not and referred the matter back to the Commissioner for further investigation and assessment. But that case was not decided as a point in *limine*. The referral back was decided by the Court on appeal, based on a record before the court *a quo* where evidence had been led. For these reasons whilst I have some sympathy with the position SARS finds itself in, I do not have the power to make such an order. SARS is not without a remedy. If the court on hearing the matter is not satisfied it can still

² [2004] 4 All SA 410) in para 24.

³ 2016(2) SA 608(SCA).

refer the matter back. But it may only do so after hearing the matter as section 129 contemplates. The point in *limine* thus fails.

Further directions

[13] The taxpayer in his counsel's practice note suggested further directions if the point in *limine* was not upheld. However, in argument when I raised this Counsel, who appeared for the taxpayer, and who had not prepared the practice note, took instructions, and thereafter suggested instead that further directions should be left to a case management meeting to consider. I have adopted this approach and not opted to give further directions.

ORDER

I make the following order:

1. The point in *limine* dismissed.
2. SARS is to pay the costs of the taxpayer.