REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT MEGAWATT PARK)

CASE NOs.: **IT 24870**

IT 25162

IT 25166

(1) REPORTABLE: ~~YES~~ / **NO**

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / **NO**

(3) REVISED.

6 July 2023 **……..**

DATE SIGNATURE

In the matter between:

THE TALL **APPLICANT**

and

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

J U D G M E N T

This judgment has been handed down remotely and shall be circulated to the parties by way of email / uploading on CaseLines. The date of hand down shall be deemed to be 6 July 2023

BAM J

A. Introduction

[1] The applicant, Tall brought the present application in terms of section 117 (3) of the Tax Administration Act[1] (the Act) read with rule 51(2) of the Rules,[2] wherein it seeks the following relief:

1.1 Directing that the tax appeal in respect of 2012 year of assessment under case number IT 25162, be consolidated with the tax appeals between the same parties in respect of the 2013 to 2016 years of assessment under case numbers IT 24870 and IT 25166;

1.2 Directing that the applicant is entitled to rely, in respect of its 2012 year assessment, on the grounds of appeal pleaded in paragraphs 10 to 53 of its rule 32 statement filed in the underlying appeal proceedings for the consolidated 2013 to 2016 years of assessment, to the extent that these are applicable to the 2012 year of assessment.

[2] In the background to the application are several appeals in which Tall challenges SARS's decision of disallowing the former's objections. SARS is opposing the application. Before passing to set out the bases of SARS's opposition, it is convenient to mention that the first issue of consolidation has been resolved. The parties have agreed that the appeals be heard together, instead of consolidation.

[3] SARS submits that the extent to which a taxpayer may appeal a ground is determined by reference to the facts and the rules. It says that Tall, as a matter of fact, had not objected to the capital amount in the 2012 year of assessment. Thus, according to rule 10(3) read with rule 32(3) Tall may not appeal a new ground against a part or amount not objected to. SARS further says that, contrary to the claim made by Tall, it is impermissible to object to the "whole of the assessment". Finally, the relief sought by Tall is, according to SARS, precluded by section 100 of the Act as the assessment has become final.

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1 Act 28 of 2011, as amended.

2 The rules are promulgated in terms of section 103 of the Act.

B. Background facts

[4] The background facts are few and are not in dispute. They are: On 6 March 2018, SARS issued a letter of finalisation of audit findings in which additional income tax assessments (assessments) had been issued for the 2012 to 2015 years of assessment. Two separate objections were subsequently lodged by the applicant, which dealt with:

(i) SARS's decision to re-open the 2012 year of assessment, after three years had elapsed. This objection is referred to as the prescription objection by the parties.

(ii) The second objection dealt with the levying of the penalty in the 2012 year of assessment; and

(iii) The last, objected to the specific amounts and or parts of the 2013 to 2015 years of assessment.

[5] Tall's objections were disallowed and consequently it lodged an appeal. Each appeal was allocated its own case number. For example, the prescription appeal was allocated case number IT 25162. The second objection dealing with the penalty against the 2012 year of assessment was allocated case number IT 24870 and finally, the appeal dealing with the 2015 assessment was allocated case number IT 25166. The parties disagreed when Tall, in its rule 32 statement, purported to dispute the capital amount raised in the 2012 year of assessment, thus introducing a new ground on appeal which had not been objected to. SARS contends that Tall's conduct in this regard is struck by the provisions of rules 10(3) and 32(3).

[6] To complete the background, it is recorded that in the disputed assessments for the 2012 tax year, SARS made the following determinations:

(i) That the prerequisites set out in section 99 (2) of the TAA — for issuing assessments after three years had elapsed — had been satisfied. (The prescription determination)

(ii) That capital gains in the sum of R47 329 834 realised by various trusts (Tier 1 Trusts) and distributed by those Trusts to Tall and on distributed by Tall to its own beneficiaries, were taxable in the hands of Tall. (Para 80 capital amount)

(iii) A capital gain in the amount of R8 537 657 realised by Tall from a disposal of its own property, (RH Portion 98) and distributed by Tall to its own beneficiaries was taxable in the hands of Tall. (Para 10 capital amount)

(iv) Imposed an under-statement penalty of R 2 654 128 on the capital gains assessed. (Penalties)

(v) Levied interest on the resultant additional tax liability. (Interest)

C. Tall's case

[7] The pith of Tall's case may be crystallised thus:

(i) Tall submits that it is clear from the objection letter to the 2012 assessment that its objection to the prescription determination was also an objection to the capital amount. It says that the ground of objection relied upon in respect of the capital amount is prescription.

(ii) In the second instance, Tall says that its objection based on prescription was an objection to the whole of the 2012 assessment. It was not limited to any part of the assessment, nor was it limited to any amount embodied in the assessment.

D. The law

[8] In terms of rule 7, which deals with objection against assessment:

> "(2) A taxpayer who lodges an objection to an assessment must—
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> …;
>
> (*b*) set out the grounds of the objection in detail including—
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> (i) specifying the part or specific amount of the disputed assessment objected to;
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> (ii) specifying which of the grounds of assessment are disputed; and
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> (iii) submitting the documents required to substantiate the grounds of objection that the taxpayer has not previously delivered to SARS for purposes of the disputed assessment;"

Rule 10 (3) provides that, "The taxpayer may appeal on a new ground not raised in the notice of objection under rule 7 unless it constitutes a new objection against a part or amount of the disputed assessment not objected to under rule 7."

Rule 32(3)[3] in its current form, post the amendment, provides:

> "(3) The appellant may include in the statement a new ground of appeal unless it constitutes a ground of objection against a part or amount of the disputed assessment not objected to under rule 7."

[3] The reference to rule 32(3) is to its amended form as set out in the *Government Gazette* 48188, Government Notice 4136 of 10 March 2023, including the applicability provision.

Tall did not object to the capital amount in the 2012 year of assessment

[9] SARS contends that at a factual level, it is common cause that Tall did not object to the capital amount. It refers to a letter shared by Tall's legal representatives with SARS's representatives following a Pre-Trial meeting held in January 2021. The relevant parts of the letter read:

> "Dear Ms Mast, I refer to yesterday's pre-trial.
>
> Having looked through the documentation it is clear that (a) objection on the merits for 2012 was not lodged,…."

[10] Given the undisputed content of the letter and the background details, SARS submits that those should put an end to the claim that Tall had objected to the merits of the 2012 assessment, at least at a factual level. I agree.

[11] On the question of Tall's rule 32 statement, in which Tall purported to appeal a ground/s against an amount or part of the assessment which were not objected to, SARS relies on a number of decisions of the SCA. The first of such cases is *Computek* v *The Commissioner, SARS*, the facts of which mirror, to some degree, the facts of the present case. The taxpayer, in *Computek*, had been assessed for three amounts, which were: (i) a capital amount consisting of output tax on the turnover that had not been declared. (ii) penalties and (3) interest. In its objection the taxpayer objected to penalties and interest and specifically stated that it agreed with the output tax on the turnover. In its rule 32 statement, the taxpayer sought to challenge the quantum of the capital amount of output tax on the turnover by alleging that the turnover figure used included another entity's supplies. The SCA upheld the decision of the Tax Court, holding:[4]

> "In my view, for the reasons that follow, the conclusion of the tax court is unassailable. In its notice of objection read together with the letter that accompanied it…, it is quite clear that the taxpayer did not object to the capital amount…The letter, far from objecting to the revised capital assessment, goes so far as to refer to the capital assessment of R1,246 177 as being uncontested. In disallowing the objection, SARS made it clear to the taxpayer that it has not objected to the 'quantum of additional VAT output raised.' … It follows that not having raised an objection to the capital assessment in its notice of objection, the taxpayer was precluded from raising it on appeal before the Tax Court."

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4 (830/2011) [2012] ZASCA 178 (29 November 2012), paragraph 8.

[12] The court further reasoned: [5]

> "What then is the effect of the conclusion that the taxpayer did not object to the capital assessment? *In Matla Coal Ltd v Commissioner for Inland Revenue* 1987 (1) SA 108 (A) Corbett JA held (at 125C-J):
>
> > 'Section 81(3) of the Act provides that every objection shall be in writing and shall specify in detail the grounds upon which it is made. And in terms of s 83(7)(*b*) the appellant in an appeal against the disallowance of his objection is limited to the grounds stated in his notice of objection. This limitation is for the benefit of the Commissioner and may be waived by him… Here, although we do not have a similar statutory provision to that encountered in *Matla Coal*, I can conceive of no reason why the principle that is established there should not apply with equal force to an objection and appeal under the VAT Act. The rationale for such a principle is explained by Cloete JA (*Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd & others* 2007 (6) SA 601 (SCA) para 26) thus:
> >
> > ". . . It is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end – .." ' "

[13] In ITC 1912, the court, reasoning the same question of an appeal against a part or an amount which had not been objected to said: [6]

> "The next issue that arises is whether, in terms of the interpretive approach adopted by the court, M's new grounds of appeal actually constitute impermissible new objections or not….
>
> In other words, what is prohibited is for a taxpayer to appeal against a portion of assessment in respect of which no objection was ever raised. For example, if an objection was raised to the penalties imposed but not the VAT portion of the assessment, an appellant is not permitted, through the guise of an appeal, effectively to raise a subsequent objection to the VAT portion. This is essentially what occurred in the *Computek* case, tied on by SARS…"

[14] The *ratio* from the two cases referred to is decisive of the question raised by Tall in its second prayer of its Notice of Motion. Although it may not have been clear, the simple import of prayer 2 is that Tall, in respect of its 2012 appeal, be allowed to rely on the grounds raised in the 2013 to 2015 years of assessment, where it specifically objected to the various amounts or parts of the assessment. It is plain from the cases discussed that Tall is not allowed to appeal against an amount or part of the assessment, in respect of which no objection had been raised.

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5 Footnote 3 paragraph 11.
6 80 SARC 417.

Amounts or parts of assessment v amounts or parts objected to

[15] In a further effort to demonstrate that Tall had indeed not objected to the capital amount in the 2012 additional assessment, reference is made to paragraphs 1.1.1, 1.2 and 1.3 of the letter of 6 March 2018. In the letter SARS sets out the transactions and facts that gave rise to capital gains of R47 million (Paragraph 80 capital amount), the applicable provisions, its interpretation and the application to the facts and decision. Similarly in paragraphs 1.1.1, 1.2, and 1.4 SARS sets out the transactions and facts that gave rise to the gains of R8.5 million (the paragraph 10 capital amount), the provision, its interpretation to the facts and decision. Each one of these amounts were individually assessed and ought to have been individually and specifically objected to, which was not done by Tall, as already stated elsewhere in this judgement.

Objection to a whole assessment is not permissible

[16] Tall contents that by objecting to the prescription determination it effectively objected to the whole of the 2012 assessment. SARS argues, correctly so, with reference to the *ratio* in *First South Africa Holdings*[7] that an assessment is not merely a mathematical computation of the globular amount, but a determination of one or more items or amounts. It is to those parts or amounts that Tall was enjoined to specifically object against, as set out in rule 7.

The relief sought is precluded by section 100 of the TAA

[17] Finally, SARS contends that in any event, the assessment pertaining to the 2012 year of assessment, that is in so far as merits are concerned, has become final in terms of Section 100 of the TAA. The section reads:

> "(1) An assessment or a decision referred to in section 104(2) is final if, in relation to the assessment or decision—
>
> …
>
> (*b*) no objection has been made,…"

[18] That an assessment becomes final where no objection has been made was confirmed in *Commissioner for the South African Revenue Service* v *Airports Company for South Africa*. The facts in ACSA had to do with an amendment in terms of Rule 28 which ACSA had successfully applied for in the High Court to amend its objection against an additional assessment issued by SARS on 30 March 2016 in respect of the taxpayer's 2011 year of assessment. Upholding the appeal by the Commissioner, the SCA held: [8]

> "[22] Moreover, once an objection has been disallowed, rule 10(2)(c)(iii) of the tax court rules makes provision for a taxpayer to introduce a new ground upon which it appeals against an

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7 73 SATC, 221 SCA.

8 (Case no 785/2021) [2022] ZASCA 132 (7 October 2022), paragraphs 23-25.

assessment. Rule 10(3), however, provides that such new ground cannot constitute a new objection against a part or amount of the disputed assessment not objected to in the notice of objection under rule 7.

[23] The effect of the amendment sought by the taxpayer will be to extend the period for the filing of an objection (or the filing of new grounds of objection) long after the peremptory periods prescribed in s104 of the TAA, read with rule 7, have expired…To permit amendments to an objection would unjustifiably undermine the principles of certainty and finality referred to in *Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd and Others*, which underpin a revenue authority's duty to collect taxes."

E. Conclusion

[19] On the basis of the undisputed facts in this case and the law as discussed, Tall's application cannot succeed.

F. Order

[20] The application is dismissed with costs.

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NN BAM
JUDGE OF THE HIGH COURT
PRETORIA

Date of Hearing: **18 April 2023**

Date of Judgment: **6 July 2023**