REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA
(HELD AT PRETORIA, GAUTENG)

Case No.: **IT 46204 & VAT 22494**

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

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

(3) REVISED.

6 November 2024
DATE

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SIGNATURE

In the matter between:

COMPANY A (PTY) LTD **Applicant/Appellant**

and

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

J U D G M E N T

KEKANA, J

Introduction

[1] This is an application brought by Company A (applicant) seeking an order separating the issues pending tax appeal.

Background

[2] The applicant is appealing against additional assessments which SARS raised against it (Company A), which was based on contracts entered into between Company A and the Passenger Rail Agency of South Africa (SOC) Ltd ("PRASA"). The contract(s) which were later pronounced by the High Court as unlawful and invalid a decision which was later upheld by the Supreme Court of Appeal (SCA).

Issues

[3] Issues for determination are whether the Applicant have made out a case for separation in terms of Tax Court Rule 42(1), read with High Court Rule 33(4). In summary whether the applicant will be able relying only these two judgments to advance an argument only on question of law, which question can only be determined separately.

Submission and contentions

[4] The applicant argues that effect of the PRASA judgments is that both the income tax and VAT assessments should be set aside and that this is capable of being determined upfront as a question of law without evidence. That the contractual regime upon which SARS' assessments are based was declared *void ab initio* and substituted by a new regime when the Court after declaring the contract(s) unlawful and invalid ordered the appointment of an independent engineer to evaluate the work done and compile a report on the value thereof. In summary the applicant contents that the legal interpretation of these two judgments is such that Company A was consequently not entitled to any payment under the PRASA contracts and that all deposits made by PRASA and received by Company A were not received by Company A on its behalf nor for its own benefit. That if the separated issue is decided in Company A's favour, it will dispose of the dispute pertaining to Company A's liability for the additional income tax for which it has been assessed.[1]

[5] SARS's contention is that the Court did not declare the contract(s) *void ab initio,* that the separated issues do not involve only matters of law also, that the separation of issues would not be convenient since even once disposed of, would not be dispositive of the entire

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1 See para 45 of the Applicant's Head of Arguments.

appeal.[2] Furthermore, that the issues sought to be separated are inextricably linked to an enquiry into the merits of the appeal. That the merits call for Company A to present evidence at the tax appeal, which evidence is to be tested during cross-examination.

Legal principles and analysis

[6] Both the applicant and the respondent rely on a number of authorities which I did not refer to in their submissions and contentions however, I will refer to some authorities as and when I respond to submissions and contentions made as they become relevant.

[7] I agree with the authority referred to by the Respondent, the SCA[3] case which describes the very purpose of separation:

> "…The entitlement to seek the separation of issues was created in the rules so that an alleged lacuna in the plaintiff's case can be tested; or simply so that a factual issue can be determined which can give direction to the rest of the case and, in particular, to obviate the leading of evidence…"

[8] The crisp issue is whether if any determination was to be made on the legal effect the two PRASA judgments, and the answer thereto if in favour of Company A, will completely change the rest of the case between Company A and SARS creating a new regime which will automatically be dispositive of the tax appeal. This crisp issue is adumbrated by the fact that the answer thereto must be achieved on its own without leading evidence otherwise a separation cannot be granted.

[9] I will start with the submission made by the applicant that upon careful reading of the two judgments, by law they render the PRASA contracts *void ab initio*, I disagree with this submission as nowhere in the two judgments was the phrase *void ab initio* used. Even when invited by one of the *amicus curiae* to declare the contracts *void ab initio,* the High Court elected not to use the phrase. The use of the phrase would have the practical legal effect the resultant of which would have been a restitution. Again, the same *amicus curiae* sought for restitution however, the Court elected not to grant it but most importantly the court expressly pronounced against it.[4] In doing so the Court also pronounced on the impracticability of the relief of restitution. I therefore conclude that the contracts were not declared *void ab initio*, in fact the Court appreciated the existence of the contracts hence it ordered the independent engineer to value the work done, the work ought to have been done and amount paid under

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2 See para 13 of the Respondent's Head of Arguments.

3 *The City of Tshwane Metropolitan Municipality v Blair Atholl Homeowners Association* (106/2018) [2018] ZASCA 176 (3 December 2018) at para 48.

4 See para 166 of the High Court Judgment.

the contracts.[5] The independent engineer can only do so using the same aforesaid contract(s) argued by the applicant to *void ab initio* as reference. It was never the intention of the Courts in the two judgments to declare the contracts *void ab initio*.

[10] As regards the submission made by the applicant that while it received the deposits, the payments so received was not for its own behalf nor for its own benefit since there was a possibility to return the money to PRASA. The applicant refers to the *Geldenhuys*[6] case which explains the principle of "received by and for the benefit of". Counsel for the applicant went on to read a paragraph which had in it an important concept namely, 'restriction', it should be noted that none of the two judgments imposed any restriction on how Company A should deal or handle the money. This argument and the authority relied on by the applicant would be relevant only if the Court have imposed restrictions on the deposits or payments made or any monies held by Company A pending the report of the independent engineer. In the absence of such restrictions by any of the two judgments, Company A's submission that the payments received were not for its own benefit cannot be correct.

[11] In determining whether the income received by the taxpayer is for his or her own behalf and for his or her own benefit one will have to look at the intention at the time of the event, which is the receipt. The capacity of the taxpayer at the time of receipt. If the taxpayer was in a representative capacity, then the amount so received will be for the benefit of the third party the taxpayer is representing and will not be included in the taxpayer's gross income. In the present case before me it is evident that at the time of receipt Company A was acting and received the payments on its own behalf and for its own benefit. The amounts received were enjoyed by Company A free of restrictions on the manner they should be handled. The taxpayer was able to use, enjoy and control including assuming any risk thereto. This has the potential to be inviting a debate on the concept of beneficial ownership, the facts are clear that Company A at all times met all four components of a beneficial owner namely, the possession, the use, the control, lastly the risk. I will leave the issue of benefit here as all points are that Company A was always the beneficial owner who benefited. Just on this point alone read with the latter part of the SCA case referred to in para 8 above "*to obviate the leading of evidence*" a separation remains incompetent as the taxpayer will have to present evidence to proving contrary.

[12] In order to show that they did not benefit from the payments received from PRASA, the taxpayer will have to adduce evidence to show how it dealt with the payments received *ex facie* the court orders. This is not just a legal question but necessitates a factual enquiry. The fact that there will be a need for evidence to be led renders rule 33(4) inapplicable. Nowhere

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5 See para 38 of the Supreme Court of Appeal (SCA) Judgment.

6 1947(3) SA 256(C).

in the papers does the applicant demonstrate on how it dealt with the money after the two court orders. There was no trust account created solely to hold the PRASA payments, the deposits were always kept in the business account, there will evidence required for the applicant to prove that it did not deal with the money like any money held in that business account. Again, there is some capacity recognisable in law required for one to claim to be holding for the benefit of a third party.

[13] The applicant's submission that the separation if granted in its favour would be dispositive of the tax appeal is misplaced in that the assessment by SARS was based on invoices issued and payments received. Assuming of course without concluding that from the engineering report, there was to be any change in amounts between Company A and PRASA there is available remedy and recourse to make adjustments both in terms of the Value-Added Tax Act[7] (*VAT Act*) and the Income Tax Act[8] (*ITA*). The current assessment will remain, and the taxpayer may advance new information to its argument during an appeal which if supported and accepted may results in a reduced assessment. But the current assessment does not fall away, it remains valid until the taxpayer is able to present evidence supported in terms of the ITA, which evidence will trigger a reduced assessment. These are issues, the taxpayer will have to ventilate at the tax appeal. As such the tax appeal will not be disposed only because there exists a possibility of new information. The new information if any may still be an issue contended and or central in the tax appeal.

Conclusion

[14] Company A will have to present evidence that it did not benefit from any of the deposits made. It is the same evidence that it will have to be adduced at the tax appeal. The result will be the overlapping of evidence. The issues sought to be separated will not dispose the tax appeal as the unlawfulness or invalidity of the contract have no bearing, even if the contracts were to be declared illegal. The contracts could have been declared illegal, which was not the case, SARS could still impose tax liability on illegal receipts.[9] Any argument on the lawfulness or the illegality of the contracts is irrelevant and becomes purely academic for tax purposes.

[15] One of the canons taxation, 'certainty'[10] is not only applicable to taxpayers but also to revenue authorities. It then cannot be expected that revenue authorities should conduct, and issue assessments when payments are made (receipts) or alternatively on the unconditional

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7 89 of 1991.

8 58 of 1962.

9 See *ITC 1545*. See also *MP Finance Group CC v Commissioner, South African Revenue* 2007 (5) SA 521 (SCA).

10 Ritika Muley 'Canons of Taxation: Meaning, Types and Characteristics' https://www.economicsdiscussion.net/government/taxation/canons-of-taxation-meaning-types-and-characteristics/17428#google_vignette

legal obligations (accrued) emanating from contracts and should thereafter keep track of what is happening with every contract enter into between the taxpayer and third parties.

[16] The two court orders dealt with the relationship between Company A and PRASA, no pronouncement was made of the fiscal consequences. SARS was not a party during the proceedings. An illegal contract may still have fiscal consequences.

[17] The principle in taxation is that one is taxed either on receipt or accrual whichever comes first. In this case the taxpayer was assessed and taxed on receipt, that the payments received was not for the taxpayer's benefit is a factual enquiry that can only be proved by evidence being led particularly as SARS already has evidence in the form of invoices issued and payments deposited into Company A's business account. The taxpayer will also have to lead evidence to show that it held the funds on behalf of PRASA and for the benefit of PRASA and most importantly in which capacity were the funds held. It is not just a question of law but rather a factual enquiry as there is a specific conduct and behaviour expected for someone who claims to be a holder for the benefit of and on behalf of a third party. It is this conduct that requires that evidence be led by the taxpayer. There is a risk that there will be a duplication of evidence in respect of the separated issues and in the rest of the appeal. It is the existence of this duplication even if potential that separation will not be granted.

[18] In the circumstances the following order is made:

18.1 That application for separation of issues by the applicant is dismissed with costs.

18.2 That the applicant shall pay the cost of this application on the scale of C including the employment of the two counsels.

ND Kekana
Acting Judge of High Court

Hearing: 04 November 2024

Judgment: 06 November 2024