IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG, PRETORIA

Case No: 79960/2019

In the matter between:

MOBILE TELEPHONE NETWORKS (PTY) LIMITED **APPLICANT**

And

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

JUDGMENT

HUGHES, J

Introduction

[1] The applicant in this matter is Mobile Telephone Network (Pty) Ltd (MTN) a private company which is in the business of a mobile network operator and service provider. It provides mobile telephony, data, and related services and facilities to the

South African customer. Whilst the respondent is the Commissioner for the South African Revenue Service (SARS) who is responsible for the administration and enforcement of the Tax Administration Act 28 of 2011(the Tax Act) and amongst others Value-Added Tax Act 89 of 1991 (the VAT Act).

[2] It is prudent in these proceedings to set out the relief sought by the applicant as is set out in the notice of motion. The reason therefore becomes evident in the judgment. The orders sought are in the following terms:

'1. Declaring that the supply by the Applicant of pre-paid tokens or vouchers for a consideration denominated in Rand, entitling the holder to receive available services and products on the MTN mobile network, as selected by the holder, to the extent of the monetary value stated on or attributed to the tokens or vouchers ("multi-purpose vouchers"), constitutes a supply as envisaged in section 10 (18) of the Value-Added Tax Act No 89 of 1991 ("the VAT Act");

2. Declaring, accordingly, that the supply of such token or voucher is disregarded for the purpose of the VAT Act, except to the extent (if any) that the consideration for the multi-purpose vouchers exceeds the monetary value stated thereon;

3. To the extent necessary, declaring to be incorrect and/or setting aside the ruling issued by the Respondent on 4 April 2019, to the effect that the pre-paid vouchers fall within the ambit of section 10 (19) of the VAT Act and that value-added tax must accordingly be accounted for by the Applicant when the voucher is sod to the subscriber;

4. Directing the Respondent to pay the costs of this application.'

[3] The prevailing situation in this country is that Value-Added Tax (VAT) is imposed in terms of section 16(1) of the VAT Act. A vendor is obliged to calculate the tax payable by it in respect of each tax period during which he carried on an enterprise. The applicant as a vendor and the particular category it falls within is obliged in the course of carrying out its enterprise to submit monthly returns. Other vendors, depending on their category, might have a two, six or twelve month return obligation. It is trite that the payment of VAT to the respondent is dependent on the calculation of VAT by the vendor for that particular period.

[4] The dispute between the parties emanates from the manner in which VAT is attributed when the applicant supplies members of the public certain types of pre-paid vouchers or tokens. The situation is as follows: the applicant provides pre-paid vouchers in Rand denominations which provides the voucher holder to access different types of services and products of the applicant's up to the value of the voucher. The question then is, are these vouchers to be treated for VAT purposes in terms of section 10(18) or (19) of the VAT Act? The applicant submits that it should be treated under section 10(18) as the supply of multi-purpose vouchers falls under this section, whilst the respondent contends that the applicable legislation for the multi-purpose vouchers is section 10(19).

Brief Background

[5] During these times the sphere of mobile technology has evolved over the years and it is a well-known fact that the applicant provides various network and technical services at a cost to its subscribers. This case revolves around the provision and supply of pre-paid services, from which the applicant draws two classifications:
- the first, being those vouchers purchased which entitle the holder to specific products or services. This is a single-purpose voucher.
- the other are vouchers purchased for multi-purpose. This voucher is a pre-paid voucher in Rand denominations valid for a specific period. The holder may use this voucher for any of the applicant's services or products once activated to the value of the voucher. It is the latter, multi-purpose voucher, which is the corner stone of this case.

[6] In this case, the applicant's multi-purpose voucher has been dubbed, the 'airtime' voucher. The way this voucher works, is that the products and services purchased are redeemed against the available pre-paid funds of the subscriber at the prevailing price when purchased. The applicant states that 'the pre-paid amount is effectively currency from which the subscriber pays for the services selected from time to time.'

[7] According to the applicant an ‘airtime’ voucher is a pre-paid voucher which allows a subscriber to access the applicant’s services and it is not only limited to making or receiving calls on the applicant’s mobile network, though these services are included. The ‘airtime’ voucher is deemed to operate as follows: as soon as the subscriber purchases and activates this multi-purpose voucher the subscriber’s relevant SIM card is credited to the value of the voucher. The applicant describes this storage of money from which the subscriber can activate funds, as a ‘main wallet’, which can be used for products and services on the applicant’s network.

[8] Thus, according to the applicant, the subscriber determines when and for what he or she will utilize the pre-paid value in the main wallet. Once a particular service is accessed by the subscriber, the applicable cost of that service based on the prevailing tariff is then deducted from the subscriber’s main wallet.

The Law

[9] Section 10(18) of the VAT Act provides as follows:

‘Where a right to receive goods or services to the extent of a monetary value stated on any token, voucher or stamp (other than a postage stamp as defined in section 1 of the Postal Services Act, 1998, and any token, voucher or stamp contemplated in subsection (19)) is granted for a consideration in money, the supply of such token, voucher or stamp is disregarded for the purposes of this Act, except to the extent (if any) that such consideration exceeds such monetary value.’

[10] Whilst, section 10(19) states:

‘Where any token, voucher or stamp (other than a postage stamp as defined in section 1 of the Postal Services Act, 1998) is issued for a consideration in money and the holder thereof is entitled on the surrender thereof to receive goods or services specified on such token, voucher or stamp or which by usage or arrangement entitles the holder to specified goods or services, without any further charge, the value of the supply of the goods or services made upon the surrender of such token, voucher or stamp is regarded as nil.’

The case of the Applicant

[11] The applicant contends that the declaratory it seeks is a means of obtaining proper tax treatment in respect of the multi-purpose vouchers, that being the pre-paid airtime vouchers. Notably the applicant contends that the provision of such vouchers are in terms of section 10(18) of the VAT Act.

[12] The applicant contends that the cornerstone of its case is that when a subscriber purchases the multi-purpose voucher it does not recognize the revenue at that time. It is only when the voucher is used for a particular service or product, as requested by the subscriber, and the main wallet is debited. The applicant contends that the revenue is now recognized.

[13] The applicant places reliance on the explanatory memorandum paragraph 5.6.15 (a) and 5.16.5(b), respectively, which accompanied the Bill which introduced sections 10(18) and (19). The section 10(18) voucher is a voucher which is granted for monetary consideration and is regarded as a means of exchange, similar to money. Importantly, when the voucher is purchased for a consideration equal to monetary value, tax is not charged. However, when the voucher is tendered for goods or services supplied to the holder, tax is then charged in full on those goods or services.

[14] On the other hand, the explanatory note of section 10(19) makes provision for a voucher issued for a monetary consideration, for specified goods or services, once surrendered. Those specified goods or services elected will be without further charge to the voucher holder. In this instance the tax is charged on issuing the voucher and none is charged when the voucher is surrendered.

[15] Hence, the applicant contends that their pre-paid multi-purpose airtime vouchers with a monetary value thereon operates as money, which the holder would use in order to pay for a particular service, subsequently selected. They further contend that the voucher does not entitle the holder to specific goods or services, instead, it’s a means to pay for unspecified services in the future.

[16] Consequently, the applicant sought a VAT ruling from the respondent to regard the pre-paid multi-purpose voucher as falling within the realm of section 10(18). The

respondent refused to grant the ruling sought by the applicant. In short the respondent made a ruling that the airtime vouchers of the applicant of which a ruling is sought, fell within the realm of section 10(19) and not 10(18) of the VAT Act.

The case of the Respondent

[17] The respondent contends that the relief sought by the applicant is not competent in the context of the VAT Act. This is so, they say, as the applicant seeks a 'generic declaratory order' that is not time specific and does not have a termination date as well, in respect of their supply of airtime vouchers.

[18] They further contend that as the applicant's multi-purpose airtime voucher could be classified within either section 10(18) or (19), depending on the facts, they are adamant that with the evidence presented by the applicant, the voucher falls within the ambit of section 10(19) of the VAT Act. The respondent explains that this is so as the nature of the voucher in question is that 'the recipient of the voucher is entitled on the surrender thereof to receive goods or services that by usage or arrangement entitles the holder to specified goods or services.'

[19] The respondent emphasized that all along the applicant had treated the multi-purpose vouchers in terms of section 10(19) of the VAT Act, until it sought a ruling from the respondent. The respondent states that the reason for the applicant seeking that these vouchers be treated under section 10(18), is solely to gain a financial advantage when these voucher are considered by the respondent. The respondent contends that the applicant in effect seeks to disregard the supply of the voucher but rather seeks to subject to Vat the 'supplies made using the voucher'.

[20] The respondent contends that the overall position that the applicant seeks by way of this application is the delay of the VAT consideration at the point of sale of the voucher and if the voucher is not used the retention of the VAT consideration on the voucher purchased.

Discussion

[21] As far back as 15 November 2017, the applicant requested of the respondent to issue a VAT ruling in terms of section 41B of the VAT Act to confirm that multi-purpose vouchers be dealt within the realm of section 10(18) of the VAT Act. Thus, the supply of such vouchers would not attract VAT, as the goods or services are unspecified at the time of supply and would only do so when such voucher is redeemed for goods and services to the extent of the monetary value stated on such voucher. Stated differently, the applicant seeks a declaratory that its multi-purpose voucher attain rights as envisaged in section 10(18) 'to receive goods to the extent of a monetary value' as opposed to entitling the holder to 'specific goods or services' as envisaged by section 10(19).

[22] On 4 April 2019 after discussions and further information was requested and received by the respondent, it delivered its ruling in terms of section 41B. The ruling requested was refused and such refusal was set out as follows:
'the Commissioner cannot accede to your request. The airtime vouchers as described …fall within the ambit of section 10(19) … and VAT must be accounted for by MTN when the voucher is sold to the subscriber.'

Is the declaratory relief sought competent?

[23] As set out above the relief sought by the applicant is declaratory in nature. The applicant contends that it is trite that the High Court may be approached for the granting of such an order in tax matters and it is appropriate to seek such relief, in light of the refusal of the ruling sought. Accordingly, so the argument goes, a real dispute with regards to the interpretation of the relevant VAT legislation exists. The applicant contends that there is no dispute of fact, as the issue is merely one on interpretation and application of the law, that being the VAT Act. The applicant seeks this court to exercise its discretion in the granting of the declaratory.

[24] In advancing its case for the declaratory sought the applicant relied on the *dicta* in *Commissioner for the South African Revenue Service v Langholm Farms (Pty) Limited,* where Supreme Court of Appeal state the following:

'SARS made it clear that refunds may only be claimed on fuel that was delivered, stored and dispensed from storage facilities on the premises of Langholm. In so doing SARS expressed a clear view as to the proper construction of s 75(1C) (a)(iii). Langholm disagreed and responded with the application, in an effort to resolve this dispute. It is true that Langholm could have waited and provided SARS with the documents it required for a revised assessment, and then challenged such an assessment, and argued the point of law at that stage. The issue is whether it was obliged to do so. In my view there was nothing objectionable in Langholm seeking clarity on an issue of statutory interpretation that would clearly influence the outcome of SARS' audit. If the court accepted Langholm's view of the proper interpretation of s 75(1C) *(a)*(iii) of the Act, SARS would have had to return to the audit and re-assess its position in the light of any further information and debate with Langholm. There was little point in Langholm entering into a debate or providing further information when none of it would be at all relevant given SARS' legal view. That Is exactly the situation for which declaratory orders are made and seeking one in the context of a taxing statute was endorsed by the Constitutional Court in *Metcash*.[3]'[1]

[25] Conspicuously, the respondent accepts that an applicant as a taxpayer may seek a declaratory order from this court in the appropriate circumstances. However, it contends that the circumstances presented in this case are not appropriate. This is so as firstly the applicant seeks of the court to advise it which section of the statute is correct to be adopted.

[26] The respondent contends that when the applicant sought the ruling in terms of section 41B the applicant's characterisation was that it sought a ruling on the VAT treatment of sales of pre-paid 'airtime' vouchers. However, the respondent argues that before this court, the characterisation has changed, as the applicant now seeks 'the proper VAT treatment of multi-purpose vouchers'. In light of the aforesaid, the respondent argues that this court is not enjoined to make a determination on such general terms and contends that a determination could only be made on the proper VAT treatment of the applicant's sales of 'airtime', if on a factual basis it was clear and certain. It contends this is not the case, as the applicant has failed to put up sufficient facts for such a determination to be made.

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[1] *Commissioner for the South African Revenue Service v Langholm Farms (Pty) Limited* [2019] ZASCA 168 at para 10; Footnote [3] *Metcash Trading Limited v Commissioner, South African Revenue Service 2001* (1) SA 1109 (CC).

[27] In my view, the fact that the respondent has expressed an interpretation in its ruling coupled with the fact that the applicant disagrees with this interpretation, the applicant is not precluded from bringing this application to resolve the difference of opinion. Since the respondent has made an interpretation of the ambit within which the 'airtime' vouchers fell, in terms of the VAT Act, this entitles the applicant who disagrees to seek clarity with regards to the respondent's interpretation.

[28] Further, the applicant is entitled to seek this courts assistance in light of the respondent's legal stand point on this matter. Nothing would change the respondent's interpretation of this specific section of the statute and no amount of further facts or information would alter the respondent's legal view. It is trite that such court assistance may be sought in terms of tax statutes.[2] In the circumstances, the applicant's declaratory application is properly before this court.

Interpretation

[29] Turning to deal with the relevant sections, I do not propose to restate same.

[30] The rules of interpretation of statutes have been expressed succinctly, that being, a statute must be interpreted in line with ordinary rules of grammar and syntax taking cognisance of the context and purpose thereof.[3]

[31] The Supreme Court of Appeal expanded on this as regards the interpretation of tax statutes, in *Commissioner for the South African Revenue Service v Bosch and Another*:

'The primary issue in dispute was whether the two taxpayers exercised a right to acquire the shares, within the meaning of that expression in s 8A(1)*(a)*, when they exercised the options, or whether they only did so when the time for payment and delivery arrived. That involves the proper construction of the section in accordance with ordinary principles of statutory construction. The words of the section provide the starting point and are considered in the light of their context, the apparent purpose of the provision and any relevant background material.

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[2] *Ibid Langholm Farms (Pty) Limited*
[3] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

There may be rare cases where words used in a statute or contract are only capable of bearing a single meaning, but outside of that situation it is pointless to speak of a statutory provision or a clause in a contract as having a plain meaning. One meaning may strike the reader as syntactically and grammatically more plausible than another, but, as soon as more than one possible meaning is available, the determination of the provision's proper meaning will depend as much on context, purpose and background as on dictionary definitions or what Schreiner JA referred to as 'excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene'.[4]

[32] In my view the best place to begin this exercise is to set out the intended purpose of each section, as is set out in the Explanatory Memorandum, paragraphs 5.6.15(a) and 5.16.5(b) respectively. These accompanied the Bill before it was enacted as statute.

'**Clause 10(18)** applies in respect of a token, voucher or stamp [other than those contemplated in sub-paragraph (b)] which has a monetary value stated thereon and is granted for a consideration in money e.g. a gift voucher. The supply of the token, voucher or stamp is to be disregarded except to the extent that the consideration exceeds the monetary value. The token, voucher or stamp is regarded as a medium of exchange similar to money. When the holder purchases the token, voucher or stamp for a consideration equal to the monetary value tax is not then chargeable. When he subsequently tenders the token, voucher or stamp in payment or part payment for goods or services supplied to him tax is chargeable in full on the supply of the goods or services.'

'**Clause 10(19)** applies where a token, voucher or stamp is issued for a consideration in money and the holder thereof is entitled on surrender thereof to receive goods or services **specified on such** token, **voucher** or stamp or which by usage or arrangement entitles the holder to **specified goods or services** without further charge. The value of the supply of the goods or services made upon the surrender of the token, voucher or stamp is deemed to be nil. In this case, tax is charged when the token, voucher or stamp is issued.'

[33] The applicant issued two categories of vouchers the one granting the holder thereof to acquire specified services or products and the other voucher is a multi-purpose voucher, which once activated for its monetary value the holder is entitled to use it for any service or product on the applicant's network. The later voucher is the

[4] *Commissioner for the South African Revenue Service v Bosch and Another* 2015(2) SA 174 SCA at para 9.

bone of contention in this case. The multi-purpose voucher is termed by the applicant as ‘airtime’ voucher. Once the ‘airtime’ voucher is used for a service or product, the holder is charged at the prevailing rate and such amount is deducted from the value of the ‘airtime’ voucher.

[34] The applicant contends that on issuing the multi-purpose voucher to the voucher holder it does not equate to revenue and only when the voucher is activated and in fact used that is when it is considered as revenue. In my view, this cannot be correct as in terms of section 9(1) of the VAT Act the applicant is entitled to account for VAT charged on the sale of a voucher in the period in which the voucher was sold. As the supply of ‘airtime’ in the form of a voucher attracts revenue for the applicant, in terms of section 7(1)(a) of the VAT Act tax is levied ‘on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him’.

[35] In addition, the voucher supplied is specifically an ‘airtime’ voucher. It cannot be said that an ‘airtime’ voucher is akin to a gift voucher, which is a means of payment for goods or services, as is proposed by the applicant. This is so as the ‘airtime’ voucher can be used to make calls, receive calls, send messages, use the internet and for data and as such does not take away from the fact that the supply of ‘airtime’ falls within the category of specific goods or service.

[36] The ‘airtime’ voucher as a specific good or service could be used for multi-purpose. However, this does not change the nature of the voucher being specifically an ‘airtime’ voucher. Thus, the respondent was correct when it ruled that the ‘airtime’ voucher falls within the ambit of section 10(19).

[37] I need to make mention of the fact that from the time ‘airtime’ vouchers were introduced by the applicant and over the many years of its usage the applicant acceded to the interpretation ascribed by the respondent for such ‘airtime’ voucher. This is a vital and ought to be factored in when addressing a statutory interpretation and examining of the words, their contexts, the determination of their meaning and purpose of the statutes. To this end I refer to *Bosch*:

'There is authority that, in any marginal question of statutory interpretation, evidence that it has been interpreted in a consistent way for a substantial period of time by those responsible for the administration of the legislation is admissible and may be relevant to tip the balance in favour of that interpretation.[11]This is entirely consistent with the approach to statutory interpretation that examines the words in context and seeks to determine the meaning that should reasonably be placed upon those words. The conduct of those who administer the legislation provides clear evidence of how reasonable persons in their position would understand and construe the provision in question.[12] As such it may be a valuable pointer to the correct interpretation. In the present case the clear evidence that for at least eight years the revenue authorities accepted that in a DDS scheme the exercise of the option and not the delivery of the shares was the taxable event, fortifies the taxpayers' contentions.'[5]

[38] Consequently, considering the factual background, the purpose of the relevant sections of the statute in question, its context and wording, I am satisfied that the interpretation ascribed by the respondent to the airtime voucher being endorsed as falling within the realm of section 10(19) is correct, for the reasons I have set out above.

[39] Turning to the issue of costs of two counsel I am not persuaded by the applicant's argument that costs of only one counsel should be permitted. This matter is of importance to the respondent, the public at large and the *fiscus*. The respondent was justified in employing two counsels.

Order

[1] The application for a declaratory order as set out in the notice of motion of the applicant is dismissed with costs. Such costs are to include the employment of two counsel, where so employed.

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[5] *Ibid* para 17; [11] *Nissan SA (Pty) Ltd v Commissioner for Inland Revenue* 1998 (4) SA 860 (SCA) at 870E-H; [12] *MTK Saagmeule (Pty) Ltd v Killyman Estates (Pty) Ltd* 1980 (3) SA 1 (A) at 12F-H.

W. Hughes

Judge of the High Court

Virtually Heard: 12 November 2020

Electronically Delivered: 12 January 2021

Appearances:

For the Applicant: Adv Janisch SC

Instructed by: Werksmans Attorneys

For the Respondent: Adv Sholto-Douglas SC

Instructed by: State Attorney