THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 372/10

In the matter between:

FIRST SOUTH AFRICAN HOLDINGS (PTY) LIMITED — **Appellant**

and

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

Neutral citation: *First South African Holdings v CSARS* (372/10) [2011] ZASCA 67 (11 May 2011)

Coram: Harms DP, Lewis, Ponnan, Bosielo and Theron JJA

Heard: 03 May 2011

Delivered: 11 May 2011

Summary: Income Tax Act 58 of 1962 ─ section 79A ─ interpretation ─ date of commencement.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Webster J sitting as court of first instance):

The appeal is dismissed with costs including the costs of two counsel.

JUDGMENT

HARMS DP (LEWIS, PONNAN, BOSIELO and THERON JJA concurring)

[1] The appellant, First South African Holdings (Pty) Ltd (the taxpayer), applied on notice of motion to the High Court, Gauteng North, for an order that a decision of the respondent, the Commissioner, South African Revenue Service, be set aside. The Commissioner had held that he was precluded by law from considering the taxpayer's request for the issue of a reduced assessment to income tax in respect of the 2002 tax year. The request was based on the provisions of s 79A of the Income Tax Act 58 of 1962. The application was heard by Webster J, who dismissed it with costs, including those of two counsel. He subsequently granted leave to appeal to this court.

[2] The facts are few and not in dispute. The taxpayer rendered an income tax return for the 2002 year stating that its taxable income amounted to R15 892 978. It sought to set off against that income an assessed loss of R34 978 418 carried over from the previous tax year. This meant that the taxpayer had on its own showing suffered a tax loss of R19 085 440 (R34 978 418 minus R15 892 978) which, presumably, could be carried over to the next financial year.

[3] The taxpayer, in calculating its 2002 income, failed to take account of the fact that certain foreign exchange gains were not fully taxable in terms of s 24I(7A) of the Act. It accordingly overstated its taxable income. The taxpayer, it might be mentioned, did not repeat this mistake in the subsequent years but it also did not

notify the Commissioner of the mistake made previously because it was unaware of it.

[4] The Commissioner, also oblivious of the error, accepted the taxpayer's figures and issued an income tax assessment on 17 July 2003 accordingly. He assessed the income of the taxpayer at R15 892 978 and he allowed the carrying over of the assessed loss of R34 978 418 for purposes of set-off and, therefore, no tax became due to the Commissioner for the particular year.

[5] On 12 April 2006 the Commissioner issued an additional assessment in respect of the 2002 year, disallowing set-off of the 2001 assessed loss. The Commissioner was entitled to do so in terms of s 79(1) of the Act since the three year period, which began to run on 17 July 2003, had not yet expired. This meant that the taxpayer's income for that year, namely R15 892 978, became fully taxable. With interest added in terms of s 89quat the sum of R6 681 010 became due to the Commissioner. It is important to note at this point that the Commissioner, ex facie the papers, did not reassess the taxpayer's income, but only the set-off of the 2001 assessed loss.

[6] The taxpayer lodged an appeal against the refusal of the Commissioner to set off the balance of this assessed loss. (The appeal also concerned other tax years and issues but the particulars are not germane for this judgment.) The matter was settled and the taxpayer withdrew its appeal relating to the particular additional assessment.

[7] In a letter dated 24 July 2007 the taxpayer, having by then realised that it had overstated its income for the 2002 year by not taking into account the provisions of s 24I(7A), applied to the Commissioner for a reduced assessment for the 2002 year in terms of s 79A. This provision, which was introduced by s 28 of the Taxation Laws Amendment Act 30 of 2002, reads to the extent relevant, as follows:

'(1) The Commissioner may, notwithstanding the fact that no objection has been lodged or appeal noted in terms of the provisions of Part III of Chapter III of this Act, reduce an assessment—

(a) . . .

(b) where it is proved to the satisfaction of the Commissioner that in issuing that assessment any amount which—

(i) was taken into account by the Commissioner in determining the taxpayer's liability for tax, should not have been taken into account; or

(ii) . . .:

Provided that such assessment, wherein the amount was so taken into account . . ., was issued by the Commissioner based on information provided in the taxpayer's return for the current or any previous year of assessment.

(2) The Commissioner shall not reduce an assessment under subsection (1)—

(a) after the expiration of three years from the date of that assessment; or

(b) . . ..'

[8] The taxpayer's argument amounted to this: (a) the 2006 assessment was based on information provided by the taxpayer for the 2002 year; (b) it is not in dispute that the taxpayer had overstated its taxable income for that year; (c) tax was accordingly calculated on an incorrect amount; (d) the Commissioner should have accepted that he had a discretion to reduce the assessment under s 79A(1); and (e) he was consequently incorrect in assuming that he was not entitled to consider the application for reduction.

[9] The Commissioner opposed the high court application on two bases: he first argued as a point *in limine* that s 79A did not apply to the 2002 year; and, alternatively, he said that the taxpayer was time-barred by s 79A(2)(a) because the three-year period began to run when the original assessment was issued on 17 July 2003 and not on the date of the additional assessment, namely 12 April 2006, as was submitted by the taxpayer.

[10] The Commissioner's point *in limine* was based on the provisions of s 85(2) of the Amendment Act. It is in these terms:

'Save in so far as is otherwise provided in this Act or the context otherwise indicates, the amendments effected to the Income Tax Act, 1962, by this Act shall for purposes of assessments in respect of normal tax under the Income Tax Act, 1962, be deemed to have come into operation as from the commencement of years of assessment ending on or after 1 January 2003.'

Since the error arose in relation to the 2002 year and the Act applied only to a tax year ending during 2003, so the argument went, the taxpayer was not entitled to apply under the section and the Commissioner was not entitled to entertain the request.

[11] The Amendment Act did not only amend the Income Tax Act but also Acts such as the Insurance Act 27 of 1943, the Estate Duty Act 45 of 1955, and the Customs and Excise Act 91 of 1964. These amendments, according to general principles, came into effect on the date of publication of the Act, which was 5 August 2002. Section 13(1) of the Interpretation Act 33 of 1957 provides that

'[t]he expression "commencement" when used in any law and with reference thereto, means the day on which that law comes or came into operation, and that day shall, subject to the provisions of subsection (2) and unless some other day is fixed by or under the law for the coming into operation thereof, be the day when the law was first published in the Gazette as a law.'

[12] The amendments to the Income Tax Act in the Amendment Act were a mixed bag. Some were taxing provisions and others, such as the one under consideration (as well as, for instance, sections 29 to 32), were administrative. Some of the taxing provisions had their own particular dates of commencement (eg sections 10, 12, 14) while the rest were covered by the general terms of s 85(2). This explains the use of the phrase 'for purposes of assessments in respect of normal tax under the Income Tax Act, 1962' in the subsection. Those amendments to the Income Tax Act that were introduced for purposes of assessments in respect of normal tax were to come into operation as from the commencement of years of assessment ending on or after 1 January 2003. Those with their own dates commenced on the given dates. And as to the balance the provisions of the Interpretation Act applied.

[13] The Commissioner wished us to ignore the phrase quoted as being redundant. It is not. Its purpose was to state the obvious: as a general principle taxing provisions deal with future matters and are backdated only exceptionally. Section 79A is not a provision inserted for purposes of assessments in respect of

normal tax and the point *in limine*, which was not decided in the court below, cannot be upheld.

[14] As an aside, the taxpayer submitted that we could not consider the point in the absence of a cross-appeal but at least since *Municipal Council of Bulawayo v Bulawayo Waterworks Co Ltd* 1915 AD 611 at 631 such a point has no merit: the Commissioner did not seek a variation of the order in his favour. He sought only to support it on another ground.

[15] The second issue, as mentioned, is whether the taxpayer was time barred by s 79A(2)(a). This depends on the question whether the three-year 'prescription' period began to run once the original assessment was issued on the date of the additional assessment. The date of the 'error' is irrelevant. If 'assessment' in s 79A were to be a reference to the notice of assessment, the latter date would presumably be the applicable one. But that is not what an assessment is. It is a 'determination' by the Commissioner of one or more matters (compare *ITC 1077* 28 SATC 33 at 38 per Corbett J).This appears from the definition of the word in s 1 of the Income Tax Act:

'"assessment" means the determination by the Commissioner, by way of a notice of assessment (including a notice of assessment in electronic form) served in a manner contemplated in section 106 (2)—

(a) of an amount upon which any tax leviable under this Act is chargeable; or

(b) of the amount of any such tax; or

(c) of any loss ranking for set-off; or

(d) of any assessed capital loss determined in terms of paragraph 9 of the Eighth Schedule,

and for the purposes of Part III of Chapter III includes any determination by the Commissioner in respect of any of the rebates referred to in section 6 and any decision of the Commissioner which is in terms of this Act subject to objection and appeal.'

[16] The 2006 assessment was a re-assessment of a loss ranking for set-off under para (c). It did not re-assess the income of R15 892 978 under para (a). What the

taxpayer sought is an indulgence relating to the latter and not the former — it had overstated its income. It wanted the Commissioner to re-consider the quantum of its taxable income but, using the wording of the section, 'that assessment' was made during 2003 and became final during 2006. The section does not allow the Commissioner to revisit 'any' assessment.

[17] The taxpayer submitted subsequently that it is in effect seeking a re-assessment of the tax payable under para (b) and that it is entitled to do so because that amount was assessed for the first time in 2006 in the additional assessment and that the three-year period has not lapsed. The problem with the submission is that any re-assessment of the tax payable under para (b) will be dependent upon a re-assessment under para (a), which means that the amount of tax payable would simply be a mathematical calculation based on a re-assessment under para (a). In other words, a re-assessment under para (a) would be a prerequisite for one under para (b).

[18] This result might at first blush appear to be unfair towards the taxpayer in the circumstances of this case. But any other conclusion about the meaning of 'assessment' would have meant that the Commissioner could within three years as from 2006 have reconsidered the taxpayer's taxable income of R15 892 978 by means of a new assessment under s 79(1), thereby raising the taxable amount six years after his original assessment of that amount. That is unthinkable (*Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd* 2007 (6) SA 601 (SCA) para 26).

[19] In the result the appeal is dismissed with costs including the costs of two counsel.

L T C Harms

Deputy President

APPEARANCES

APPELLANT/S	M M Rip SC (with him H V Vorster) Instructed by TRM Daniel Erasmus Attorneys, c/o Rooth & Wessels, Pretoria Symington & De Kok, Bloemfontein
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