IN THE SOUTH GAUTENG TAX COURT

HELD IN JOHANNESBURG

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED

…… ……

ITC Case number: 0038/2015

In the matter between:

ABC (PTY) LTD **Appellant**

and

THE COMMISSIONER FOR THE SA REVENUE SERVICE **Respondent**

JUDGMENT

SATCHWELL J:

Introduction

1. This judgment is concerned with discharge of the onus to prove "exceptional circumstances" as required in terms of section 104 of the Tax Administration Act 28 of 2011 when seeking extension of the period allowed to a taxpayer for objection to an assessment.

2. The taxpayer was audited by SARS in May 2014, audit findings were furnished in August 2014, representations were made by the taxpayer in November 2014 and assessments raised against the taxpayer in December 2014 in respect of Unemployment Insurance, Skills Development Levy, Employees Tax, Secondary Tax on Companies, Income Tax and Value Added Tax.

3. The taxpayer lodged an objection against these assessments on 5th June 2015 which objections were disallowed on the grounds that 'no exceptional reasons had been furnished'. The taxpayer appeals against that finding.

Section 104 of the Tax Administration Act 28 or 2011 (the TAA)

4. Section 104 of the TAA permits a taxpayer to object to an assessment within the period prescribed in the rules,[1] *viz.* 30 days, which period may be extended but not for a period exceeding 21 business days "unless a senior SARS official is satisfied that exceptional circumstances exist which gave rise to the delay in lodging the objection."

5. It is common cause that appellant should have objected by 2nd March 2015 (30 days from date of assessment plus the *dies non* period of the Christmas recess). It is common cause that appellant's objection was only lodged on 5th June 2015 and was therefore out of time by 65 business days.

6. The provisions of section 104(5) are peremptory. They are clearly expressed. The period for objection "must not be extended" [my underlining]. That is the framework within which this appeal for relief is sought.

7. The onus is therefore on appellant to satisfy this court that "exceptional circumstances exist which give rise to the delay in lodging the objection". This means that unusual facts must be proven which have a causal connection to the delay which resulted.

Extraneous argument

8. Counsel for the taxpayer made a variety of submissions, some of which had no relevance to the enquiry into the existence of exceptional circumstances and their causal relation to the 65 business day delay.

9. Firstly, that the 65 days delay is not a long period of time when viewed in the context of the period of 3 years which elapses before prescription results. There is no merit in this proposition – what is required is proof of certain facts which occasioned the delay.

---

[1] Rule 7(1) provides that a notice of objection must be delivered within 30 days after the date of assessment.

10. Secondly, that the audit findings of August 2014 were so little different from the assessment of December 2014 that the intervening correspondence from the taxpayer in November 2014 could be regarded as an objection. There is no merit in this submission because there was no assessment in August and, in any event, the documents are not the same.

11. Thirdly, that the relevant SARS official failed to consider the reasons which motivate for exceptional circumstances before making the decision of 22nd June 2015. There is no merit in this submission because no facts or argument adverting to exceptional circumstances were ever tendered prior to 22nd June 2015.

12. Fourthly, that the appeal is not against the decision of 22nd June but the letter of 3rd August 2015 which is subsequent to appellant furnishing a motivation on 25th June. There can be no merit in this argument since the letter of 3rd August did no more than confirm the decision already made on 22nd June and restated that, at that time, no exceptional circumstances had been tendered.

13. Finally, that appellant had been invited to resubmit an amended objection in the letter of 22nd June advising of the decision to refuse to consider such objection and therefore the subsequent communication from appellant on 25th June should have been properly and reasonably considered and adjudicated in the 3rd August communication. There is no merit in this suggestion since there is no indication of an invitation to submit an amended objection and, in any event, the provisions of section 104 of the TAA would not permit this to be done.

14. Much of this argument or many of these submissions were not contained in the written heads of argument and were made off the cuff by counsel appearing for appellant and should not have been presented in such fashion.

15. Much time was spent by appellant's counsel on reference to the finding of an 'invalid' objection in the SARS communication of 22nd June 2014. In fact, the notice of motion asked this court to make a finding that this objection was 'valid' which suggests that this court should make a determination as to the merits of the objection. I find that this concern about validity or invalidity is not of relevance when I am required to make a determination as to discharge of the onus in terms of section 104 of the TAA.

Exceptional circumstances which gave rise to the delay in lodging the objection

16. A number of issues were argued. None were based upon documents or proof. All were no more than argument but were, regrettably, presented as though there were facts or evidence contained somewhere in the papers before the court which (unfortunately) could not be found.

17. First, that the assessments and the objections thereto involved complex issues of law. No indication as to the nature of such complexities was ever indicated. It is correct that a number of statutes are involved but I have received no argument as to the reason why tax on use of motor vehicles, PAYE not deducted from employees or any other of the matters would be considered complex. I do not comment on whether or not there is any such complexity – simply that I was given no indication as to the basis on which I could make such a finding.

18. Second, the courts were closed over the December 2014/ January 2015 period. I fail to understand what impact the existence of the court recess could have had on not attending to lodging an objection over the period mid December 2014 (the assessment) to March 2015 (due date). There was no application to the court and neither the assessment nor an objection thereto needed to be brought to the attention of any court official.

19. Third, the taxpayer was busy in negotiations with SARS over the period December to March 2015. When I pressed appellant's counsel for details of such negotiations he claimed that SARS own answering affidavit referred to a 'series of meetings'. I had no recollection of such admission and pressed him for details. None existed. At most was the existence of one visit by appellant's auditor to the SARS offices on 19th January 2015. I am most concerned that counsel should be so loose with the facts and persist and persist *ad nauseam* as regards a 'series of meetings' when no evidence of such exists.

20. Fourth, appellant became dissatisfied with the capabilities of his auditor and terminated use of his services. This supposedly necessitated delay in obtaining further professional advice. No indication has been given as to why or when or how the auditor was incompetent. He is a CA (SA) and it is irrelevant that he is from Zimbabwe. There are no facts upon which I can conclude that this auditor was incapable - after all the letters prepared by this auditor in November 2014 are little different from the opinion of counsel (undated) contained in the papers which is apparently acceptable to the appellant. It would appear that appellant was dissatisfied with the response of SARS and not doubtful about the expertise of the auditor.

21. Fifth, it apparently took appellant time to obtain new professional advice – from a practitioner based in Florida. Only in April 2015 was appellant furnished with the name of this representative who prepared an undated opinion for his client (portion of which is included in the papers). Since appellant is based in Springs on the West Rand, I see no reason why this court cannot take judicial notice of the multiplicity of attorneys' firms operating all along that stretch of the Witwatersrand region and up into Sandton whence appellant may have enquired, at any time subsequent to the assessment in December 2014, as to the tax expertise of such attorneys and advocates.

22. None of these submissions persuade me of the existence of 'exceptional circumstances'. They are neither unusual nor causally connected to the delay.

23. Interpretation Note 15 requires SARS officials to consider, *inter alia*, the reasons for the delay, the length of the delay and the prospects of success of the objection.

24. It was submitted that the objection made by appellant enjoys good prospects of success and I was referred to an opinion apparently prepared by appellant's current representative to his client. This is not a document submitted to SARS prior to the decision of 22nd June 2015. I regret that it is of little assistance to myself. It is no more than advice to a client – it is not an affidavit to which are attached any relevant documents such as logbooks in respect of vehicles, contracts with employees, contracts with soccer clubs and so on. Nothing is contained in this document which gives this court any indication of the existence of a *prima facie* case. There is no more than the "mere say-so" of appellant's counsel.[2]

Conclusion

25. I am sympathetic to any taxpayer who is confronted with an enormous amount of tax to be paid in terms of an assessment where it was the ignorance of the taxpayer which led to his or her failure to comply with the provisions of the TAA.

26. But the taxpayer, whose assessed liability runs to millions of Rands, should have taken its tax responsibilities seriously enough to seek tax advice from a firm of attorneys specializing in such matters as soon as the assessments were levied in December 2014 when it became apparent that the November 2014 representations of his auditor had not been successful. The lapse of time from mid December 2014 to June 2015 is not satisfactorily explained – let alone sufficiently to discharge the onus of proving 'exceptional circumstances'.

27. In the result an order is made as follows:

    The appeal is dismissed with costs.

DATED AT JOHANNESBURG 04th MARCH 2016

SATCHWELL J

Date of hearing: 24th February 2016.
Date of judgment: 04th March 2016.

---

[2] See ITC 1777 at page 334C.