REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT – SOUTH GAUTENG

CASE NO: 12860

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

22 June 2012 .....
DATE SIGNATURE

In the matter between

XYZ CC Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

MBHA J:

INTRODUCTION

[1] This is an appeal pursuant to the provisions of s 83A(13)(a) of the Income Tax Act No. 58 of 1962 (the Act), against the decision of the

respondent disallowing the appellant's objection to the revised assessments issued on 13 March 2007, in respect of appellant's income tax for the years 2005 and 2006, and SARS's refusal to issue revised income tax assessments for the years 2003 and 2004. As this tax appeal has been referred from the Tax Board, the matter commenced *de novo* in terms of s 83A(14) of the Act.

[2] The tax dispute between the parties originally covered the appellant's 2000-2006 years of assessment. However, after exchanges of correspondence between the parties, the appellant confines itself to the 2003, 2004, 2005 and 2006 years of assessment. The tax years of assessment for 2000, 2001 and 2002 have, by agreement, been removed from this appeal.

[3] The appeal is based on the appellant's assertion that it meets all the requirements for classification as a small business corporation in terms of s 12E of the Act. On the other hand, SARS avers that the appellant does not qualify for such classification as it provides a personal service as defined in s 12E(4)(d) of the Act, and derives more than 20% of its receipts and accruals from the provision of that service and from investment income, as prescribed by s12E(4)(a)(iii). The appellant asserts that it does not derive any income from the provision of a personal service and that its investment income for the relevant years is minimal.

[4] The issues to be determined in this appeal are:

4.1 Whether the appellant qualified to be categorised as a small business corporation(SBC), as contemplated in s 12E(4)(a) of the Act, in which case it would qualify for a concessionary tax rate, and if so,

4.2 Whether the appellant is barred from using such categorisation on the grounds that s 12(4)(a)(iii) read with s 12(4)(d), operate against its categorisation as a small business corporation;

4.3 In respect of the 2003 and 2004 tax years, whether the appellant is barred from contesting the years I have referred to on the grounds that no proper objection and appeal process were followed, alternatively, whether prescription does not find application in respect of those tax years.

BACKGROUND

[5] In its accounting financial statements accompanying its tax returns for the 2000-2004 years of assessment, the appellant described its business as one of “trade marketing consultancy”. The revenue of the appellant is described in these financial statements as “consultancy fees”. In respect of the 2000-2004 years of assessment, the appellant accepted, as reflected in its returns of income (IT14s) for those years, that it was not a small business corporation, and SARS properly assessed the appellant, for the 2000 to 2004

years of assessment, as a company rendering a personal service and not as a small business corporation.

[6] In respect of the 2005 and 2006 years of assessment, the appellant submitted its tax returns on the basis that it is a small business corporation in terms of s 12E of the Act. In the annual financial statements for these years, the main income of the company is described as "fees received, which … represents the invoiced value of services provided to clients", and in the tax returns the appellant's business is stated as "Marketing". The appellant was accordingly assessed for the 2005 and 2006 tax years, as a small business corporation. It is common cause that the assessed taxes were paid timeously.

[7] On 13 March 2007, SARS issued additional assessments for the years 2005 and 2006 totalling R79 935,00. In so doing, SARS re-assessed the appellant as a company rendering a personal service and not as a small business corporation. As a result the appellant lost out on the concessionary tax rate accorded to small business corporations. On 23 August 2007 the appellant filed objections to the additional assessments on the grounds that the respondent had not provided any reasons for those assessments. On 19 October 2007 SARS issued a letter stating that the objection was disallowed as the appellant, *inter alia*, was not a small business corporation as contemplated in s 12E(4)(a)(iii) of the Act; renders a personal service as contemplated by s 12E(4)(d), and consequently was not eligible for the concessionary tax rates applicable to small business corporations. In

amplification of the allegation that the appellant was rendering a personal service, SARS contended that this was in the form of broking, consulting and management as contemplated in s 12E(4)(d) of the Act and that the services in question were performed personally by a person who held an interest in the appellant, and who either acted alone or in conjunction with others.

[8] In respect of the 2003 to 2004 tax years, SARS contends that these assessments have prescribed. In the alternative it contends that if they are found not to have prescribed, the appellant failed to follow the appropriate objection and appeal procedures in contesting those assessments.

THE LAW: RELEVANT PROVISIONS

[9] S 12E(4)(a) deals comprehensively with what should be construed as a small business corporation.

[10] The section provides that: '*Small Business Corporation' means any close corporation or any company registered as a private company in terms of the Companies Act 1973, the entire shareholding of which is at all times during the year of assessment held by shareholders or members that are natural persons where –*

(i) the gross income for the year of assessment does not exceed R5 million (2004-2005) or R6 million (2005-2006);

(ii) none of the shareholders or members at any time during the year of assessment of the company or close corporation holds any shares or has any interest in the equity of any other company as defined in section 1 …;

(iii) not more than 20% of the total of all receipts and accruals (other than those of a capital nature) and all the capital gains of the company or close corporation consists collectively of investment income and income from the rendering of a personal service; and

(iv) such company is not an employment company.

[11] S 12E(4)(d) deals with a personal service as follows:

"*Personal service" in relation to a company or close corporation means any service in the field of accounting, actuarial science, architecture, auctioneering, auditing, broadcasting, broking, commercial arts, consulting, draftsmanship, education, engineering, entertainment, health secretarial services, sport, surveying, translation, valuation or veterinary science, if –*

(i) that service is performed personally by any person who holds an interest in that company or close corporation; and

(ii) *that company or close corporation does not throughout the year of assessment employ at least… full time employees (other than an employee who is a shareholder or member of the close corporation, as the case may be, or who is a connected person in relation to a shareholder or member), who are on a full time basis engaged in the business of the company or close corporation of rendering that service.*'

[12] Section 81(2) of the Act provides as follows:

'The period prescribed in the rules within which objections must be made may be extended by the Commissioner where the Commissioner is satisfied that reasonable grounds exist for the delay in lodging the objection: Provided that the period for objection may not be so extended …

(b) where more than three years have elapsed of the assessment.'

[13] Section 12E(4) of the Act provides for a beneficial tax dispensation for small business corporations. Such corporations are entitled to be assessed for income tax purposes at preferential rates prescribed by the section. The definition of a 'Small Business Corporation' contains a list of requirements to be met in order for a corporate entity to qualify as such. Simultaneously, the definition contains certain inclusionary and exclusionary criteria, namely:

13.1 a company or close corporation referred to therein is limited to a private company registered in terms of the Companies Act 61 of 1973, and a close corporation registered in terms of the Close Corporations Act 69 of 1984. Any other corporate entity, not so registered, is excluded;

13.2 the entire shareholding of the said corporate entities must be held by a natural person or persons;

13.3 the gross income of the said corporate entities may not be in excess of a stipulated amount, which may vary from year to year. Gross income, as defined in section 1 of the Act, refers to all receipts and/or accruals, excluding those of a capital nature;

13.4 the shareholders must not only be natural persons, but also not hold any shares or have any interest in the equity of any other company, other than shares in a listed company, or an interest in any portfolio in a collective investment scheme, or an interest in any body corporate established in terms of the Sectional Titles Act 95 of 1986;

13.5 the “not more than 20% rule” means that if the total of all receipts and accruals (investment income and income arising from the rendering of a personal service) is less than 20%, the disqualification will not find application. Conversely, if the total of all receipts and accruals (investment income and income derived from the rendering of a personal service), is more than 20%, then the disqualification becomes operative.

NATURE OF APPELLANT’S BUSINESS

[14] It is common cause that the appellant is a close corporation registered in terms of the Close Corporations Act 69 of 1984. It was incorporated in 1995 and has one member Ms A, who is also the public officer of the company. It carries on the business in key account trade marketing, which consists of negotiating the listing and sales of mainly food products, manufactured or imported by its principals, most notably supermarkets and

departmental stores, with major retail corporates. The appellant's business also entails the provision of promotional activities relating to the products of its clients and all related and ancillary activities including, but not limited to:

14.1 advising clients on such issues as pricing, price increases, promotional prices, cycle deals, annual incentives and terms;

14.2 placement of clients' products which involves listings, merchandising, displays, range audits and new store opening negotiations;

14.3 promotions of clients' products, involving promotional packaging, bulk buys, promotional calendars, preparing trade sponsorships and in-store demonstrations;

14.4 assisting with consumer complaints and providing feedback on consumer demands and requests;

14.5 attending bi-monthly sales meetings with sales staff of clients, holding area meetings, providing support and assistance to sales representatives and sales management staff of clients, making product presentations, promotions scheduling and conducting training and fieldwork with representatives of clients.

[15] It is common cause that in all the tax years under consideration, the appellant's nature of business never changed except for, as I have shown above, the 2005 and 2006 years of assessment, when the labelling of its business activities was described as "marketing consultancy".

[16] The appellant employed one person on a half-day basis, as a personal assistant during the relevant tax years, and also employs subcontractors to carry out its functions in certain areas of South Africa in order to extend the scope of its activities. In carrying out these functions, the appellant and its sub-contractors act on the instructions of their principals. They may make recommendations to the principals relating to the exercise of their functions but do not advise them on any other matter. The appellant is remunerated on the basis of the sales generated by its activities and in some cases, there is a basic retainer which applies until the sales reach an agreed volume.

QUESTIONS OF LAW

[17] In deciding whether the appellant qualified as a small business corporation or not, the enquiry must of necessity be directed at the following:

17.1 what is the meaning of the words **"**consulting, broking and management", and do any of the above terms describe any part of appellant's activities?

17.2 If the appellant does in fact provide any of the personal services referred to in s 12 E(4)(d) of the Act, is any specific income generated by a person who is a member of the company and, if so, does such income collectively with any investment income, exceed 20% of the appellant's receipts and accruals and capital gains?

[18] As I have shown above, the appellant was duly incorporated as a close corporation in terms of the Close Corporations Act No. 69 of 1984. Furthermore, it is common cause that the gross income generated in the relevant years was below the required thresholds. The parties are also agreed that the appellant did not hold any shares or interest in the equity of any of the prohibited companies, and that the appellant is not an employment company.

APPLICATION OF THE LAW TO FACTS: MEANING OF 'CONSULTING'

[19] It is accepted generally that the meaning of words in a statute is derived from the common law. The basic rule of interpretation is that the meaning must, unless a statute provides otherwise, or unless it would result in an absurdity, be taken to be the ordinary meaning of the word which can be found in a dictionary of established authority.

[20] The respondent endorses this approach in its Interpretation Note No. 9, dated 13 December 2002, para 2.3(b), dealing with the definition of 'personal service', where it has stated that:

> '*The definition of "personal service" is very broad and does not define the meaning of each activity. It is, therefore, necessary to analyse each activity within its* ***ordinary meaning*** *separately.*' (emphasis added)

[21] If there is any doubt about the ordinary meaning of a word used in a particular context, certain rules must be applied. There are two rules relevant to this matter: A word included in the group of words must be regarded as being of the same type as the other words in that group (*eiusdem generis*); on the other hand, if a word is not included in the group, it must not be regarded as subject to the same prescriptions as that group (*exclusio alteris*).

[22] The term 'consulting' as used in s 12E(4)(d) is not defined in the Act or in any other applicable law in South Africa. Since there are no definitions of "consulting" in the Act, or in any other statute or judicial ruling, the rules that I have referred to above that are applicable to the definition of terms used in a statute, must be applied. These rules are well-established in our law and are described in detail in such authoritative works as Du Plessis *Interpretation of Statutes* (1996), Devenish *Interpretation of Statutes* (1992) and Steyn *Die Uitleg van Wette* (1981). As I have pointed out, the basic rule is that in the absence of any legislated manner or binding judicial ruling, the meaning attributable to any word must be the meaning of the word as generally used

which can be ascertained by referring to a dictionary (see *Saria Ltd v Slabbert Burger Transport (Pty) Ltd* 2008 (5) SA 270 (SCA) .

[23] The definitions of "consulting" in the standard dictionaries I have consulted, reveal that there are several meanings to the nouns derived from the verb "consult", namely consulting, consultant and consultation, and to the verb itself, and these fall into three major categories:

23.1 those derived from the transitive verb "consult", which means to seek advice or an explanation from a person with knowledge, from a dictionary or other sources;

23.2 those derived from the intransitive verb "consult" which means to offer advice or information by such person. The Concise Oxford Dictionary, 10th Edition, Revised, (p 306) defines a consultant as "***1***. a person who provides expert advice professionally **2.** … a hospital doctor of senior rank". The other dictionary definitions of this term refer specifically to "professional advice***"***;

23.3 those related to the idea of consultation as a form of discussion between persons having different interests in a particular situation. For example, the National Roads Act 54 of 1971 requires that, before the National Roads Agency may declare any road to be a toll road, it must first consult with provincial and local authorities. Similarly, s 149(1)(a) of the Companies Act 71

> of 2008 provides that a committee of employees or of creditors, duly appointed, may consult with a practitioner about any matter relating to business rescue proceedings instituted in terms of the Act.

[24] In my view, the meaning of "consulting" as referred to in section 12E(4)(d), falls into the second category, as the activities referred to in the first and third groups do not normally involve any commercial transactions, and would therefore not be relevant for taxation purposes. It is necessary to establish the intention of the legislature when passing the relevant provision. The legislature's intention embodied in section 12E of the Act can clearly be seen from the contents of SARS' Interpretation Note 9 (*supra*), which was issued at the time of the introduction of that section, and which states (at p 5) that:

> '*Section 12E was enacted for the specific purpose of encouraging new ventures and employment creation, i.e. active small businesses. The provisions relating to SBC's are therefore* ***not intended to benefit any professional person*** *such as, for example, an architect or a lawyer who renders his/her service by means of a company or close corporation.*' [emphasis added]

Accordingly, in interpreting the term "consulting", as applicable to a personal service provided by a small business corporation for the purposes of section 12E(4), the term "professional person" is crucial in defining that term.

[25] The view that a person providing a consulting service must of necessity be a professional person, or someone of that nature is supported by the application of the *eiusdem generis*-rule of interpretation. The fields of activity

listed as personal services in section 12E(4)(d) fall into two categories, the first of which is accounting, actuarial science, architecture, auctioneering, auditing, broking, draftsmanship, education, engineering, health, information technology, law, management, real estate, research, secretarial service, surveying, translation, valuation and veterinary service which are all professional or *quasi*-professional activities, requiring a particular qualification and, in many cases, a licence, certificate, or membership of a professional body before the person concerned can participate in that activity. The second category comprises broadcasting, commercial arts, entertainment and sport, none of which is relevant to the activity carried out by the appellant.

[26] Since the term “consulting” is the least easily defined of all the terms, the rules of interpretation that I have referred to, must be strictly applied. The dictionary definition of the term must be applied and it must be regarded as the offering of advice by a professional or qualified person. I am fortified in adopting this approach, by the specific reference to a “professional person” in Interpretation Note 9 explaining the legislature’s basis of section 12E, as I have alluded to in para [24] above.

[27] The appellant, as a close corporation, cannot, in its own right hold a certificate as a “professional person”. Nor does the sole member of the appellant hold any such licence, certificate or membership of a professional body. I accordingly conclude that the appellant in this case is not involved in the business of “consulting” as used in section 12E(4)(d) of the Act.

[28] In any event, even if no definite conclusion as to the interpretation of the term '*consulting*' can be arrived at by the application of any of the rules of statutory interpretation I have referred to, then the *contra fiscum* rule must be applied and the statute interpreted in favour of the appellant. In terms of this rule, where a taxing statute reveals an ambiguity and the ambiguous provision is capable of two constructions, the court will place a construction on the one that imposes a smaller burden on the taxpayer (see David Clegg and Rob Stretch *Income Tax in South Africa*: Chapter 2; *Glen Anil Development Corporation. v Secretary for Inland Revenue* 1975 (4) SA 715 (A.D) at 727 E-H).

DO ANY OF THE APPELLANT'S ACTIVITIES CONSTITUTE '*BROKING*' AND/OR '*MANAGEMENT*'?

[29] The Concise Oxford Dictionary (*ibid*) (at p 177), defines a "broker" as a person who buys and sells goods or assets for others, and "broking" as the business or service of buying and selling goods or assets for others. The Longman Business English Dictionary (2007) (at p 60), is more specific and defines a "broker" as "a person or organisation that buys and sells securities, currencies, properties, insurance etc on behalf of other"'. Having regard to the nature of the business activities of the appellant, it is clear that the appellant does not conduct any broking transactions on behalf of its clients neither does it purport to act as a broker in any way.

[30] The Concise Oxford Dictionary (*supra*) defines “management” as the process of managing, whilst a “management company” is defined as a company which is set up to manage, for instance, a group of properties, unit trusts and investment funds. The Longman Business English Dictionary (supra) defines the term “management” as “the activity or skill of directing and controlling the work of a company or organisation or part of it”. The appellant clearly does not control or direct the activities of its clients. The management function rests with the appellant’s clients.

[31] In the light of what I have stated above, I find that the terms “broking” and “management” do not apply to any of the activities conducted by the appellant. Furthermore, it is apparent from the evidence that was presented on behalf of the appellant and the documents filed as part of the dossier describing the appellant’s business activities, that none of those activities is reflected in the terms cited by SARS. The key word in the description of the activities must be “marketing“ which is not a professional service and the member who personally performs a part of the appellant’s services has neither a professional qualification nor a professional licence.

[32] I accordingly find that SARS’ contention that the appellant renders a personal service, as defined in s 12E cannot succeed.

[33] SARS contends that the appellant is excluded from being categorised as a small business corporation because it derives more than 20% of its income from the provision of a personal service and does not qualify for any

of the concessions which would remove that objection. The appellant concedes that a very small part of its activities does consist of offering advice to his clients, but contends that such an activity does not consist of '*professional*' advice, and forms an insignificant part of its activities. Furthermore, no income is received which is specifically related to that activity.

[34] Having regard to the entire activities of the appellant, none of which is disputed by SARS, I accept the appellant's explanation that providing advice to its clients is merely an incidental part of the services provided, and that no income is directly attributable from that specific type of activity. Even if any part of the appellant's income would be derived from negotiating on behalf of his clients it, in my view, will not be possible to quantify that amount. In the circumstances, I conclude that the appellant's contention that the amount, if any, earned from that particular activity could not exceed 5% of the total income derived by the appellant, is not far-fetched.

[35] In respect of the 2003 and 2004 tax years, it is common cause that the appellant did not lodge a proper objection and no appeal process was followed in respect of those years. In any event, in terms of section 81(2) of the Act, the assessments in respect of the years of assessment 2003 and 2004 have prescribed.

[36] In the light of what is stated above, I find that SARS was incorrect in deciding that the appellant was a personal service provider as defined in s

12E of the Act, as its activities do not constitute a personal service; alternatively, that the revenue generated by any personal service provided by a member of the appellant, does not exceed the prescribed amount.

[37] In the result:

37.1 SARS is ordered to withdraw the revised assessments for the years 2005 and 2006, and to issue revised assessments for the years of assessment 2005 and 2006 in terms of which the appellant is taxed as a small business corporation in terms of section 12E of the Act.

37.2 The appeal in respect of the tax years 2003 and 2005 is dismissed.

37.3 SARS is ordered to comply with the ruling of the Tax Board that no penalties or interests be applied in respect of the years of assessment 2005 and 2006.

37.4 SARS is ordered to pay the appellant's costs of the appeal.

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B H MBHA

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

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MS J KILANI (ACCOUNTANT MEMBER)

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MR I NKAMA (COMMERCIAL MEMBER)

MATTER HEARD ON	: 20 & 22 MARCH 2012
JUDGEMENT HANDED DOWN ON	: 22 JUNE 2012
FOR THE APPELLANT	: MR MJ DYKE
FOR THE RESPONDENT	: ADV O MOKGATLE
INSTRUCTED BY	: N XULU