THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 830/2011

In the matter between

H R COMPUTEK (PTY) LTD **Appellant**

and

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

Neutral citation: *Computek v The Commissioner, SARS* (830/2011) [2012] ZASCA 178 (29 November 2012)

Bench: CLOETE, LEWIS, PONNAN and CACHALIA JJA and ERASMUS AJA

Heard: 12 NOVEMBER 2012

Delivered: 29 NOVEMBER 2012

Summary: Value-Added Tax Act 89 of 1991 – value-added tax – assessment of − objection to − appeal against disallowance of objection – taxpayer limited to the grounds stated in notice of objection.

ORDER

On appeal from: Tax Court (Johannesburg) (Coppin J sitting as court of first instance):

The appeal is dismissed with costs.

PONNAN JA **(CLOETE, LEWIS, PONNAN and CACHALIA JJA and ERASMUS AJA concurring)**

[1] During October 2003 the respondent, the Commissioner for the South African Revenue Services (SARS), conducted an audit in respect of the tax affairs of the appellant, H R Computek (Pty) Ltd (formerly H R Computek CC) (the taxpayer). The audit revealed that the taxpayer had under-declared and, in consequence, underpaid value-added tax to SARS in terms of the Value-Added Tax Act 89 of 1991 (the VAT Act). On 9 March 2004 SARS wrote to the taxpayer:

'The Vat 201 returns submitted for the periods 03/2002 to 09/2003 inclusive, have been revised to account for vat charged and not disclosed / declared on the appropriate Vat 201 returns. Additional tax equal to two hundred percent has been levied in terms of s 60 of the Value Added Tax Act No. 89 of 1991 (herein referred to as the ACT).'

The taxpayer was thus assessed to tax in the total sum of R4 040 377.28, being: (a) R1 246 177.57 as to under-declared output tax (the capital amount); (b) R2 492 355.06 as to additional tax levied on the capital amount in terms of s 60 of the VAT Act; (c) R124 617.75 as to a penalty levied on the capital amount in terms of section 39(1)(a)(i) of the VAT Act; and (d) R177 226.90 as to interest levied on the capital amount in terms of s 39(1)*(a)(*ii) of the VAT Act. The revised assessment concluded with these words:

'Should you wish to lodge an objection, kindly do so in writing and clearly marked for the attention of the writer. The objection must be received within 30 days of receipt of this notice. You are obliged in terms of s 32 of the ACT to specify in detail the grounds for the objection.'

[2] On 24 March 2004 Mr Harry Chakhala, who described himself as the sole member of the taxpayer, filed a notice of objection with SARS. For ease of reference a copy of the relevant portion of the standard notice of objection form (ADR 1) as duly completed by Mr Chakhala is reproduced here:

Assessment detail (Mark applicable tax type with an X)

Type of Tax: Income Tax/STC [X] VAT [X] PAYE/SDL/UIF Estate Duty Donations Tax Other [X]

If 'Other', please specify **PROCEDURAL MATTERS**

Nature of the amount in dispute Income [ ] Deduction [ ] Additional tax [X] Income [ ] Deduction [ ] Other [X]

Year of Assessment/Tax Period **20040309** Date of assessment/notice **20040304**

Amount of tax in dispute in terms of the assessment/notice R **4040377.23**

Grounds of objection

- In the event of a discrepancy/dispute you are required to mark the nature of dispute with an X in the appropriate box(es) to enable SARS to consider the objection.
- Please note that you may select more than one box.
- **Provide detailed grounds upon which the objection is made on a separate page(s) together, with any supporting documentation attached thereto.**

Processing-related objections

[ ] There is a miscalculation on the assessment in that an amount(s) was taken into account/not taken into account to determine the liability for tax.

[ ] Penalty imposed for the late rendition of a tax return must be remitted.

[ ] Penalty for late payment of tax must be remitted.

[X] Penalty for underestimation of provisional tax must be remitted.

[X] Interest on underpayment of provisional tax must be remitted in

[X] I do not agree with a notice/decision issued by SARS which in terms of legislation, is subject to objection on appeal.

[X] Other (please elaborate). **Refer to attachments**

Factual and interpretative disputes

[X] Additional tax in the amount of R **2492355.70** imposed must be remitted to an amount of R _____

[X] Interest in the amount of R **177 266.90** imposed must be remitted.

[ ] An amount of R _____ claimed as a deduction but which has been disallowed must be allowed.

[ ] An amount of R _____ included as income by SARS must not be so included .

[X] Other (please elaborate). **Refer to attachments**

[3] In an addendum to ADR 1 Mr Chakhala described the grounds of objection as:

'1 Unfair application of procedural matters by SARS Special Investigations.

2 Excessive add tax of 200% plus penalties and interest charges.

3. Interference of SARS Special Investigation officer into the affairs of the businesses including HR & Associates without any form of negotiations or consultations.

4 Reparations of damages caused by SARS interference and actions in the said businesses in order to put things right.

5 SARS contraventions of its own SARS CHARTER and SARS SSMO and Dispute Resolution processes.'

One of the attachments to which Mr Chakhala refers next to the tick box 'other' at the foot of ADR 1 is a three page letter written by him on behalf of the taxpayer. Whilst it touches on a range of issues, its primary focus was the conduct of one of the special investigators in the employ of SARS. To the extent here relevant it reads:

'Uncontested VAT Assessment value of R1 246 177.69 was presented to the said business on the 10th March 2004. It was noted that the said businesses have 30 days period to lodge an objection to the evaluation of the assessment. However during the same meeting, we were informed that SARS would immediately take the cash balances amounting to R821 115.22 (65.9% of the capital amount) from the said businesses accounts. We did not contest this decision though the businesses have been denied adequate resources for re-establishing meaning operations.'

[4] On 28 July 2004 SARS informed the taxpayer that its objection had been disallowed. As the first reason given for disallowing the objection SARS stated:

> 'No objection to the quantum of additional vat output raised suggesting your acceptance of these figures. Revised additional vat assessments raised on the basis of vat invoices issued and payments received for services rendered'.

On 7 October 2004 Dr W A A Gouws, a chartered accountant, wrote a letter to SARS on behalf of the taxpayer. After referring to a meeting of the previous morning and 'various discussions that had taken place', paragraph two of that letter records:

> 'I would like to note that we are in agreement with your turnover figures.
>
> The difference between your figures and those of the VAT returns relate to different methods of accounting for VAT liabilities.
>
> A further letter in this matter will be addressed to you.'

On 22 January 2007 the appellant filed a notice of appeal (form ADR 2) in respect of SARS' disallowance of its objection. It advanced the following grounds of appeal:

'1 Unfair imposition of 200% additional tax.

2 Unfair imposition and incorrect penalty.

3 Unfair imposition and incorrect interest charge.

4 Unfair tax procedural matters.'

[5] In the statement of the grounds of assessment delivered on 17 February 2011 in terms of rule 10 of the tax rules (made in terms of s 107A of the Income Tax Act 58 of 1962 (the Income Tax Act)) SARS contended:

> ‘When the objection (Notice of Objection and the letter of the grounds of Objection) and the appeal (Notice of Appeal and the letter of the grounds of Appeal) [are considered], it is clear that the Appellant does not dispute liability for the capital amount.
>
> The only amounts of the assessment that the Appellant objected to and appealed against were the levying of additional tax at 200%, interest and penalty’.

In response on 15 March 2011 the taxpayer filed a rule 11 statement, which for the first time asserted that in calculating its VAT liability SARS had included the turnover figures of a related entity, HR & Associates, of which Mr Chakhala was also the 'managing member'.

[6] At a pre-trial conference held during July 2011 the parties agreed:

'2.1 . . . that the following preliminary point must be argued and determined by the Court before the trial on main issues commences.

2.1.1 Whether or not the Appellant objected to the capital portion (i.e. dispute amount *minus* additional tax, penalties and interest) in its Notice of Objection (ADR 1 form) read with the letter of Grounds of Objection attached to the Notice of Objection. (If the Court finds that the Appellant did not object to the capital amount, the Appellant will not be entitled to raise the capital amount as an issue on trial, without leave to amend. Conversely, if the Court finds that the Appellant objected to the capital amount, the Appellant will be entitled to raise the capital amount as an issue on trial)’.

[7] The Johannesburg Tax Court presided over by Coppin J decided the preliminary point against the taxpayer, but granted leave to it to appeal to this court.

[8] The taxpayer has sought, on appeal, to assail the conclusion of the tax court: '. . . that the notice of objection and the letter accompanying it does not cover the issue which the appellant now wishes to raise, namely, that the capital amount levied for VAT is wrong'. In my view, for the reasons that follow, the conclusion of the tax court is unassailable. In its notice of objection read together with the letter that accompanied it (both dated 24 March 2004), it is quite clear that the taxpayer did not object to the capital amount. That Mr Chakhala could quite easily have done by ticking the first box which reads: ‘There is a miscalculation on the assessment in that an amount(s) was taken into account/not taken into account to determine the liability for tax’. The letter, far from objecting to the revised capital assessment, goes so far

as to refer to the capital assessment of R1 246 177.60 as being ‘uncontested’. In disallowing the objection SARS made it clear to the taxpayer that it had not objected to ‘the quantum of additional VAT output raised’. In the face of that, the taxpayer intimated through Dr Gouws, that it was in agreement with SARS' turnover figures. That was followed by its notice of appeal where once again no mention is made of a challenge to the revised capital assessment.

[9] The provisions of s 107A of the Income Tax Act and any rules made under that Act apply to objections and appeals (ss 32 (2)) and 33(4) respectively of the VAT Act). Rule 4 states that the notice of objection must be in a form prescribed by the Commissioner of SARS and must ‘be in writing specifying in detail the grounds upon which it is made’. That had earlier been brought to the attention of the taxpayer by SARS in its revised VAT assessment notice. The thrust of the taxpayer’s case before us was that in referring to the globular amount of R 4 040 377 as being the ‘amount of tax in dispute in terms of the assessment’ the taxpayer had by necessary implication raised an objection to the capital assessment, which was but one component of that globular sum. But that, as I shall show, misconceives the inquiry.

[10] Section 32 of the VAT Act identifies the subject matter in respect of which a taxpayer may object. It includes an assessment made upon a taxpayer in terms of s 31. 'Assessment' is not defined in the VAT Act. But it is in the Income Tax Act. As Harms DP put it (*First South African Holdings (Pty) Ltd v Commissioner for South African Revenue Service* 73 SATC 221 para 15) an assessment -

‘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.'

That definition does not countenance an objection to a globular amount. The capital amount was an assessment to tax in terms of s 31 of the VAT Act with which the taxpayer was dissatisfied and to which it ought to have objected pursuant to the provisions of s 32(1)*(b)*. That it did not do.

[11] What then is the effect of the conclusion that the taxpayer did not object to the capital assessment? In *Matla Coal Ltd v Commissioner for Inland Revenue*1987 (1) SA 108 (A) Corbett JA held (at 125C-J):

'Section 81(3) of the Act provides that every objection shall be in writing and shall specify in detail the grounds upon which it is made. And in terms of s 83(7)*(b)* the appellant in an appeal against the disallowance of his objection is limited to the grounds stated in his notice of objection. This limitation is for the benefit of the Commissioner and may be waived by him . . .

. . .

It is naturally important that the provisions of s 83(7)*(b*) be adhered to, for otherwise the Commissioner may be prejudiced by an appellant shifting the grounds of his objection to the assessment in issue. At the same time I do not think that in interpreting and applying s83(7)*(b)* the Court should be unduly technical or rigid in its approach. It should look at the substance of the objection and the issue as to whether it covers the point which the appellant wishes to advance on appeal must be adjudged on the particular facts of the case.'

Here, although we do not have a similar statutory provision to that encountered in *Matla Coal,* I can conceive of no reason why the principle that is established there should not apply with equal force to an objection and appeal under the VAT Act. The rationale for such a principle is explained by Cloete JA (*Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd & others* 2007 (6) SA 601 (SCA) para 26) thus:

'. . . It is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end – *interest reipublicae ut sit finis litium*; and it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right – memories fade; witnesses become unavailable; documents are lost. That is why s 79(1) seeks to achieve a balance: it allows the Commissioner three years to collect the tax, which the Legislature regarded as a fair period of time; but it does not protect a taxpayer guilty of fraud, misrepresentation or non-

disclosure. If either of the Commissioner's arguments were to be upheld, this balance would be unfairly tilted against the honest taxpayer.'

[12] It follows that not having raised an objection to the capital assessment in its notice of objection, the taxpayer was precluded from raising it on appeal before the tax court. That that must be so finds support in rule 6(3)*(a)*, which provides:

'(3) In the taxpayer's notice of appeal in terms of subrule (2), he or she —

(a) must indicate in respect of which of the grounds specified in his or her objection in terms of rule 4 he or she is appealing.'

Thus when the taxpayer challenged the capital amount for the first time in its rule 11 statement, it effectively raised a 'new objection' directed at an individual assessed amount that had not previously been objected to. It remains to add that in terms of s 32(5) of the VAT Act as no objection had been lodged against SARS' assessment that the taxpayer was liable to SARS for additional VAT output tax in the sum of R1 246 177.60, that assessment became final and conclusive in April 2007. And as a period of three years has elapsed (s 31A), the taxpayer cannot now lawfully require SARS to revisit its assessment even if it was wrong to have included the turnover of a related entity in calculating the taxpayer's VAT liability (*First South African Holdings* para17-18). It follows that the taxpayer's appeal must fail.

[13] That leaves costs: SARS sought the costs of two counsel on appeal. In my view the matter was devoid of any factual or legal complexity. There was thus no warrant for the employment of two counsel by SARS. In those circumstances it would be unjustified to mulct the taxpayer with those costs and I would accordingly only allow the costs of one counsel.

[14] In the result the appeal is dismissed with costs.

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V M PONNAN
JUDGE OF APPEAL

APPEARANCES:

For Appellant:	B G Savvas
	Instructed by: Venn & Muller Attorneys Pretoria Honey Attorneys Bloemfontein
For Respondent:	V Ngalwana N Nxumalo
	Instructed by: Advocate L Haskins Legal Representative for SARS Pretoria The State Attorney Bloemfontein