

IN THE TAX COURT OF SOUTH AFRICA

PRETORIA

Case No.: VAT 789

In the matter between:

F - CC

APPELLANT

AND

THE COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICES

RESPONDENT

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JUDGMENT DELIVERED ON 10 SEPTEMBER 2012

BERTELSMANN, J

The appellant taxpayer submitted vague Vat return that were not supported by VAT input invoices, although the taxpayer deducted the purchase prices of the goods he obtained from the output amounts. The Commissioner decided to institute a tax audit on the issues of assessment on the 7th of March 2008 in the amount of R4 553 000.00

The taxpayer objected on the basis that the tax invoices could not be obtained from the supplier due to an alleged fraud perpetrated by an administrative official in the supplier's service. Reliance was placed on behalf of the taxpayer on section 20(7) Of the VAT Act 89 of 1991

This subsection reads as follows:

“(7) Where the Commissioner is satisfied that there are or will be sufficient records available to establish the particulars of any supply or category of supplies, and that it would be impractical to require that full tax invoice be issued in terms of this section, the Commissioner may, subject to such conditions as the Commissioner may consider necessary, direct-

- 10 (a) that any one or more of the particulars specified in subsection (4) or (5) shall not be contained in a tax invoice; or
- (b) that a tax invoice is not required to be issued ; or
- (c) that the particulars specified in subsection (4) or (5) be furnished in any other manner.”

The Commissioner is correct in disallowing the objection.

The taxpayer appealed against this assessment in the failure to act in terms of Section 20(7).

The Commissioner raised the point *in limine* that this court does not have jurisdiction to deal with an appeal against the decision by the Commissioner taken under section 20(7). Reliance was placed with this submission on the first instance upon section 32(1) and section 32(4) of the Act states:

32. “Objections to certain decisions or assessments.-

- (1) Any person who is dissatisfied with-
- 20 (a) any decision given in writing by the Commissioner-
- (i) in terms of section 23 (7) notifying that person of the Commissioner's refusal to register that person in terms of the Act; or
- (ii) in terms of section 24 (6) or (7) notifying that person of the Commissioner's decision to cancel any registration of that person in terms of this Act or of the Commissioner's refusal to cancel such registration; or

- (iii) in terms of section 44 (8) of the Commissioner's refusal to make a refund; or
- (iv) refusing to approve a method for determining the ration contemplated in section 17(1); or
- (v) in terms of section 43 (5) and (6) notifying a member, shareholder or trustee of a vendor that he is required to provide surety in respect of the vendor's liability for tax from time to time; or
- (vi) refusing to remit, in whole or part, any interest or penalty in terms of section 39(7); or
- (b) any assessment made upon him under the provisions of section 31, 60 or 61; or
- (c) any direction or supplementary direction made by the Commissioner and served on any person in terms of section 50A (3) or (4)

10 May lodge an objection thereto with the Commissioner

- (4) The Commissioner may on receipt of Notice of Objection to decide, direct, supplementary direction or an assessment alter the decision, direction, supplementary direction or assessment or may disallow the Objection and must send the person notice of such alteration or disallow the Objection and must send the person notice of such alternation or disallowance, and record any alteration or disallowance made in the decision, discretion, supplementary direction or assessment."

It will be noted that immediately that subsection 20(7) is not included in the list of sections that governed decisions by the Commissioner against which an objection can be raised. Consequently no appeal can be lodged against the Commissioner's decision to this Court, see section 33

20 33. - "Appeal to Tax Court.- (1) Subject to the provisions of section 33A, an appeal against any decision, direction, supplementary direction or assessment of the Commissioner, as notified in terms of section 32 (4), shall lie to the tax court constituted under the provision of section 83 of the Income Tax Act within the period prescribed and the rules issued in terms of section 107A of the Income Tax Act for the area in which the appellant resides or carries on business or, if the appellant and the Commissioner agree, for any other area."

(3) at the hearing by the Tax court of any appeal to that court, the Tax Court may enquire into and consider the matter before it and may confirm, cancel or vary any decision, direction or supplementary direction of the Commissioner under appeal or make any other decision, direction or supplementary direction which the Commissioner was empowered to make at the time the Commissioner made the decision, direction or supplementary direction under appeal or, in the case of any assessment order that assessment to be altered or confirm the assessment or, if it thinks for, refer such matter back to the Commissioner for further investigation and reconsideration in the light of principles laid down by the Court.”

10 The Commissioner is consequently correct when he submits that this Court cannot entertain the appeal on this ground.

The parties have agreed that the only manner in which the Court could interfere with the Commissioner’s decision to decline reliance on evidence of input value other than the tax input value other than tax invoice will be by way of a review, which Mr Truter for the Commissioner submitted this to be beyond the power of this Court under the Constitution, while the Taxpayer adopted the stance that Review was possible and fell within the powers of this Court.

The provisions of the Promotion of the Administrative Justice Act 3 of 2000 do not support this approach. The preamble of this act underlines that as was held in the ***Pharmaceutical Manufacture Association of South Africa In Re: Ex Parte the President of RSA 2000(2) SA 674 CC*** that PAJA is the

20 embodiment of the Administrative Law and of Review as defined in the Constitution preamble.

Section 33(1) and (2)

S33 (1) “Everyone has the right to administrative action that is lawful, reasonable and procedurally fair;

- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must-
 - (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
 - (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) promote an efficient administration.”

PAJA defines that a Court as a Constitutional Court or the High Court or a court, quote of similar
10 status unquote. The problem lies herein for the Tax Payer is that the Tax Court is a creature of
statute without inherent jurisdiction as the High Court. See ITC 1806, paragraphs 55 to 58. This
decision was recently commented upon as follows in the Juta Tax Law Review.” Actions to force
SARS to pay refunds under section 102 of the Tax Act have to be brought to the Tax Court and not to
the High Court.” The facts of *Rossi and Others v CSARS* unreported decision delivered on 27
February 2011, Taxpayer approach the Court for an Order declaring that the SARS had to pay a
refund under section 102 of the Income Tax Act. The sole issue that had to be decided on was
whether the High Court had jurisdiction to decide on the issue. On behalf of the Taxpayers it was
argued that the jurisdiction of the High Court can never be ousted.

The Court did not agree and held that legislature would not have created a special court if every tax
20 dispute could be brought in either the High Court or the Tax Court. It is inconceivable that the
legislature intended to create competing and concurrent forums for resolution of tax disputes which
result of confusion as a result as to selection a forum.

It would not be possible to establish any useful body of precedent for the benefit of Taxpayers
themselves, if different forums develop different law on the same issue.

Fourthly the role of High Court has already been identified in the Act. It has to provide a Judge as member of the specialised Tax Court to hear appeals and not matters of first instance and our Court should be alert to the dangers of forums.

Since the Taxpayer brought the case to the High Court and not to the Tax Court the case was struck from the role. (Rhetorical comment)

The decision does not deal with whether a Review Application under the Promotion of Administrative Justice Act (PAJA), 3 of 2000, also has to be brought to the Tax Court. On the basis it was made clear in ITC 1806, paragraph 68, SATC, 117 “that the Tax Court only have adjudicate jurisdiction allocated to it by the legislature over matters brought before it.

- 10 It is submitted that Review must be brought before the High Court.” ***Rossi and Others v CSARS***. It follows that relief based upon a Review which can only be launched in terms of PAJA is beyond the jurisdiction of this Court.

The Taxpayer has indicated that that he would take steps to launch a Review in the High Court in the event the point *in limine* is upheld.

President: BERTELSMANN, J

Accountant Member: Mr N. G. Mazibuko

Commercial Member: Mr B. H. Mathibela