REPUBLIC OF SOUTH AFRICA

IN THE NORTH GAUTENG HIGH COURT
PRETORIA

CASE NO: 49017/11

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

20/02/14
DATE

SIGNATURE

20/2/2014

In the matter between:

MEDOX LIMITED Applicant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

TEFFO, J:

[1] The applicant seeks an order declaring all income tax assessments that were issued in respect of the years of assessment following its 1997 year of assessment, null and void.

[2] The application is based on the following contentions:

2.1 Before the respondent issued the applicant's 1997 income tax assessment he had already issued income tax assessments to the applicant in respect of its 1998 to 2002 and 2004 to 2009 years of assessment. In doing so, he has failed to set off the balance of assessed loss incurred in the 1996 year of assessment.

2.2 As a result the applicant was assessed for income tax together with interest totalling R5 204 481 in respect of its 2004 year of assessment and this tax liability was carried forward to subsequent income tax assessments until 2009.

2.3 Those assessments are void as the respondent acted *ultra vires* when he issued them by disregarding the mandatory provisions of s 20(1)(a) of the Income Tax Act, 58 of 1962 ("*the Act*").

[3] The application is opposed.

[4] The respondent contends that the High Court does not have jurisdiction to entertain the application as the dispute between the parties concerns the merits of the assessment.

[5] Before hearing the application condonation was granted for the late filing of the respondent's answering affidavit as well as the applicant's replying affidavit.

[6] The following facts are common cause between the parties:

6.1 The applicant (trading as Drake Personnel) commenced trading in South Africa during 1976 until 1995 when it was compulsory wound-up in terms of an order of court.

6.2 At the time of winding-up, the applicant was indebted to the respondent in the total amount of R7 779 214,90 being the total outstanding tax in respect of value added tax (VAT) and the employees' taxes (PAYE). It had incurred no liability for income tax.

6.3 The winding-up order was set aside following a scheme of arrangement made in terms of s 311 of the Companies Act, 61 of 1973. The scheme of arrangement was sanctioned by the court on 7 June 1996. In terms of the compromise arrangement, the creditors accepted payments in the amount of 10 cents in a rand for the debts due. The respondent was paid an amount of R769 061,70 as dividend in terms of the scheme of arrangement.

6.4 The applicant's 1996 return of income reflected an assessed loss of R46 622 063,00.

6.5 In the tax years of 2004, 2007, 2009 and 2010 the applicant started to make profits. It seeks to carry forward the assessed losses and set off same against the profits earned during the tax years 2004, 2007, 2009 and 2010. The applicant also incurred a further loss of R1 748 741,00 in 1997.

6.6 The applicant submitted its 1998 tax year return before submitting its 1997 tax return.

[7] The respondent made the following submissions:

7.1 The applicant is not entitled to approach the High Court to declare the assessments void where it has not exhausted the internal remedies, or remedies provided for in the Act namely, statutory objections and appeal processes as contemplated in s 81 read with s 107 of the Act. It was argued that once there is an assessment or purported assessment the starting point for expression of dissatisfaction of any sort is to lodge an objection as provided for in terms of s 81 within a specified time.

7.2 The applicant never lodged an objection for the 1998 year of assessment. It never said there is an assessed loss. No return

was submitted for the 1997 tax year. No appeal was also brought in terms of the Act. The respondent issued the assessments more than 3 years ago. The 3 year period within which to object has lapsed. The applicant realised in 2009 that the 1997 and 2003 returns have not been assessed and that the losses were not claimed. It decided to re-submit the 1997 and 2003 returns in 2011. Once the 3 year period has lapsed in terms of s 79 the assessments become conclusive.

7.3 The Act makes it clear that the lawfulness and correctness of disputed assessments must be dealt with by the Tax Court.

7.4 In dealing with the declarator, the High Court will inevitably deal with the merits of the assessment.

7.5 The relief sought by the applicant is a final order.

[8] On the other hand the applicant made the following submissions:

8.1 The Tax Court is a creature of statute as it was established in terms of s 83 of the Act and the Rules promulgated in terms of s 107A of the Act. It is not a court of law and its ruling is not a decision of a competent court of law. It does not have a similar status as that of a High Court.

8.2 The rules of *stare decisis* do not apply to the decisions of a Tax Court as its decisions are not binding.

8.3 The Tax Court unlike the High Court, does not have inherent jurisdiction. It is only clothed with limited powers derived from the Act, namely the power to consider the correctness of assessments issued by the Commissioner and appealed against in terms of s 83(1) of the Act. In terms of s 83(13) of the Act the Tax Court may confirm, alter or refer an assessment back to the Commissioner for further investigation and assessment. The Act does not provide powers to the Tax Court to make declaratory orders on the status of the income tax assessments.

8.4 It concedes that its right to object the assessment in terms of the Act has prescribed. It is adamant that it has no internal remedies available to it.

8.5 It maintains that the only remedy available to it is to obtain an order on the validity of the administrative action via a review or a declaratory order.

[9] I have to determine whether the High Court has jurisdiction to entertain an application for an order to declare the legal status of assessments.

[10] Section 81 of the Act read with the rules promulgated in terms of s 107A of the Act provides that "*a taxpayer who is aggrieved by an assessment may object to such an assessment in the manner and under the terms and within the period prescribed by the Act and the rules promulgated in terms of S 107A*".

[11] Section 81(2)(b) provides that the prescribed period within which the taxpayer ought to lodge an objection to an assessment and/or a revised assessment is a period of 3 years after which the period for objecting may not be extended.

[12] The procedure in respect of assessments and objections thereto is contained in s 81 read with s 107A of the Act and Part A of Chapter III of the Act and the rules promulgated in terms of s 107A. This procedure can be summarised as follows:

12.1 The Commissioner makes the assessment;

12.2 In terms of Rule 3, the Commissioner must provide reasons for the assessment on demand, unless he is of the opinion that adequate reasons have been provided;

12.3 In terms of s 81(1) and Rule 4, the taxpayer may object to the assessment;

12.4 In terms of s 81(4) and Rule 5, the Commissioner may allow or disallow the objections;

12.5 In terms of s 83 and Rule 6, the taxpayer may appeal against the disallowance of his or her objection;

12.6 If there is an appeal, the Commissioner must give his grounds of assessment in terms of Rule 10; and

12.7 The taxpayer must give his grounds of appeal in terms of Rule 11.

[13] In *Van Zyl NO v Master and Another* 1991 (1) SA 874 (E) at 877/878 Eksteen J said the following:

> "*The only way in which these assessments can be questioned is in the manner provided for in the Act, viz, by objecting to the Respondent in terms of s 81 of the Act and then appealing to the Special Court in terms of s 83 of the Act. The Act specifically prescribes that procedure and entrusts the determination of the amount owing to the Respondent and on appeal from his decision, to the Special Income Tax Court. If he was of the view that the document tendered was not an assessment issued by the Respondent at all or that there was some patent error in the calculation of the claim, ... the master could expunge the claim altogether or reduce it so as to reflect the amount assessed; but apart from such patent defects, the only way in which the validity of the amount claimed can be brought into question is in the manner provided for in the Act ... It is not necessary to decide whether or not the assessments were correctly made. That is a matter for the Special Court to decide and I have no intention of usurping the function of that Court (my underlining).*"

[14] The court in *Metcash Trading Ltd v Commissioner, SARS* 2001 (1) SAA 1109 (CC) held that the Tax Court is a specialist tribunal specifically tooled to deal with disputed tax cases. The following was said:

> *"Firstly s 31 constitutes a valuable weapon in the hands of the commissioner, but the compulsive force of this mechanism of the Act goes a good deal further. The dissatisfied vendor can, by lodging an objection under s 32 of the Act and, that failing, by noting an appeal under s 33, both compel the commissioner to reconsider the assessment and have its correctness reconsidered afresh by an independent tribunal."*

[15] The court further found that the High Court has jurisdiction to adjudicate upon tax matters only in circumstances where the relief sought is of an interlocutory nature.

[16] It is common cause between the parties that the applicant submitted the tax returns for the tax years of assessment 1998 onwards until 2009 before it submitted the 1997 tax return.

[17] The applicant contends that the respondent failed to set off the balance of the assessed loss incurred in the 1996 year of assessment as it issued the income tax assessment to it in respect of the 1998 tax year of assessment onwards without issuing its income tax assessment for the 1997 tax year.

[18] The applicant concedes that it did not object to the 1998 income tax assessments and neither did it appeal that decision within the prescribed 3 year period.

[19] It is clear from the papers that it was only in 2009 that the applicant realised that the 1997 and 2003 returns have not been assessed and that the losses were not claimed.

[20] Section 7(2)(a) of the Promotion of Access to Justices Act ("*PAJA*") stipulates that no court or tribunal shall review an administrative action in terms of this Act unless internal remedies provided for in any other law have been exhausted.

[21] The applicant argued that it has no internal remedies to exhaust as the prescribed period in terms of which it has to object and appeal to the assessment had lapsed. It therefore maintains that because the Tax Court has no powers to grant a declaratory order, it is entitled to bring this application in the High Court.

[22] It is correct that the declaratory order sought by the applicant in this application is in the form of a final relief. Inasmuch as the applicant submitted that in the *Metcash* case referred to *supra*, it was never held that the High Court cannot grant a final relief, the same can also be said that the court in that case never arrived at a decision that the High Court can grant a final relief in tax-related disputes.

[23] It is my considered view that it cannot be correct to say that a party that has failed to invoke the remedies as provided for in the Act or internal

remedies because of its own making, can come to a different forum and claim to be heard on the basis that it has no internal remedies to exhaust.

[24] It is clear from the authorities referred to *supra* that the lawfulness and correctness of disputed assessments must be dealt with by the Tax Court.

[25] It cannot be correct that the Legislature intended to create competing and concurrent fora for resolution of tax disputes with resulting confusion as to selection of fora.

[26] The role of the High Court is to provide a judge as a member of the specialised Tax Court to hear appeals and not matters of first instance.

[27] The applicant did not exhaust the internal remedies when time still allowed it. Now he wants to circumvent the provisions of the Act by coming to the High Court in terms of a declaratory order which it contends will have the same effect as a review of the respondent's decision under the PAJA where the administrative action is reviewed and set aside. Our courts should discourage this kind of applications as they are tantamount to forum shopping.

[28] I am of the view that this application cannot be entertained without getting into the merits of the assessments. The merits of the assessments fall within the competency of the Tax Court.

[29] It is further my considered view that once an assessment has been done, the parties are therefore locked into the jurisdiction of the Tax Court. They must exercise their rights in the Tax Court. Once they have failed in the Tax Court, they can go to the Supreme Court of Appeal ("*SCA*") and the Constitutional Court ("*CC*").

[30] Having read the papers and having heard counter-arguments from both counsels, I agree with the submissions made by the respondent's counsel.

[31] I am therefore of the view that this Court does not have jurisdiction to entertain this dispute. The dispute should have been pursued by way of an objection lodged with the Commissioner and thereafter appealed to the Special Tax Court which is the appropriate forum to deal with matters of this kind.

[32] In the premise I make the following order:

The application is dismissed with costs.

M J TEFFO
JUDGE OF THE NORTH GAUTENG
HIGH COURT, PRETORIA

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