THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURTOF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA) 23/08/17

CASE NO:23896/17

(1) REPORTABLE: NO/YES

(2) OF INTEREST TO OTHER JUDGES: NO/YES

(3) REVISED.

(4) Signature Date 23/08/2017

A WAY TO EXPLORE — APPLICANT

and

THE COMMISSIONER OF THE SOUTH AFRICAN REVENUE SERVICES — RESPONDENT

JUDGMENT

KHUMALO J

[1] This is an unopposed application. The Applicant is seeking in terms of s 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), an order:

[1.1] setting aside Value Added Tax (VAT) assessments raised on 22 July 2016 by the Respondent, the Commissioner: South African Revenue Services ("CSARS") under the VAT Act 89 of 1991 ("the VAT Act"), in respect of the Applicant's November 2015 and January 2016 VAT periods,

[1.2] directing the Respondent to pay within 10 days of the order, the refund due to it from its self assessment for the mentioned VAT periods that the Respondent had set off against zero-rated supplies in other previous tax periods, together with interest payable thereon in terms of s 190 (1) of the Tax Administration Act 28 of 2011("TAA");

[1.3] Alternatively, an order setting aside the notices of invalidity ("NOI") the Respondent issued on 27 January 2017 that reject as invalid Applicant's Notice of Objections ("NOO") to the Respondent's assessment of its November 2015 and January 2016 VAT periods.

[2] The Applicant alleges that the assessments were raised **without it being notified,** in that the Respondent failed to notify it as provided in s 42 (1) (b) of TAA **when the audit identified the potential adjustments of a material nature** or, to provide the Applicant with the outcome of the audit as required in terms of s 42 (3) of the TAA, for its response to the facts and conclusions set out in the document.

[3] The court was implored, when considering the Application, not to be concerned with the merits of the assessments raised or the basis of the objections to the assessments but only consider whether the assessments were lawfully issued, which the Applicant alleges were *ultra vires* the TAA) and on that basis to order a payment of the refund from Applicant's self-assessment. The Applicant's counsel argued that the court has power to order the payment.

[4] The Applicant has, in its heads of argument, abandoned the alternative prayer for an order setting aside the Respondent's NIO.

FACTUAL BACKGROOUND

[5] The Applicant is a privately owned company in the business of recruiting English-speaking South Africans and securing them seasonal employment with employers in North America. The employment is generally in amusement parks in the United States of America and Canada. The Applicant also facilitates the transportation of the recruits from South Africa to the countries and places of their employment which services are paid for by their employers. The Applicant alleges that the invoices for the services it renders to the employers of the recruits who are non-residents are zero-rated in terms of s 11 (2) (1) of the VAT Act.

[6] On 10 December 2015 the Applicant submitted its VAT 201 returns for the November 2015 period that an amount of R103 668.05 to be a VAT refund owing to it. On the same day it received a s 40 notice and a request letter from the Respondent notifying it that its VAT 201 declaration has been identified for verification **due to variances detected in its submission**. Applicant was therefore instructed to review (reappraise) its declaration against the relevant VAT calculations and material it had submitted, and if it finds any errors to correct them and submit a request for correction of its declaration. If it does not find any errors pertaining to the said VAT 201 to submit certain relevant documents that included, inter alia, an **input and output tax schedule** of the capital expenditure claimed and other transactional documents that would substantiate any increase, decrease in sales, inventory change in use, **adjustment** or bad debts. It was put on terms to comply within 21 days from date of the notification.

[7] Rene Wegkamp ("Wegkamp"), a director at Applicant and deponent to the Applicant's Founding Affidavit, declares that the requested documents were uploaded on the Respondent's electronic tax filing portal on 18 December 2015. Copies thereof that are attached to the Founding Affidavit include, *inter alia*, a document titled "Tax type report as at 30 November 2015" with subtitles "**Tax type 1 Vat-Standard rated- Output tax"** under which 2 items of receipts for local recruit fee income of a total amount of R657.90 are listed and also a subtitle "**Standard rated Input tax**" under which a variety of payments are listed including inter alia, made to Veterinary hospitals, Attorneys, Accommodation Houses, Pretoria FM, Vodacom, Pharmacies and for Accounting Fees. Invoices from **ILaanga Energy for R100 301.76**, **Tagwaan Solar CO for R175 436.77 (R173 156.77), SABC for R69 904.80 and Hydro Floor Service (Alumicon CC) for R32 148.00 are also attached.** There is no mention in the report of a zero rated output or input tax or invoices attached of alleged zero rated services or goods exported. Whilst in the Applicant's Vendor Declaration VAT201 Form, **the amount of R2 509 200 is reflected as zero-rated (excluding goods exported). In** column B of the Form an amount of R103 575.95 is reflected as the **Vat, standard- rated total** and the total input tax/ refundable as R103 668.05.

[8] On 15 February 2016 the Applicant received the Respondent's notice that reiterated the request and alerted it that no response has been received to the verification notification either requesting a correction of the VAT 201 or furnishing the relevant material it has been called upon to furnish. It was followed by another notification on 4 April 2016 in which Applicant was again advised that its VAT returns have been identified for verification and requested to respond similarly as in the initial notice. Subsequent to that notification, the Applicant received a reminder and final request on 25 April 2016. Wegkamp confirms that except for the one response on 18 December 2015 to the first notice of 10 December 2015 there was no response to the subsequent notifications as he reckoned it was not necessary.

[9] Similar notices and requests were received in respect of the January 2016 VAT 201 returns. The initial notice was received on 24 February 2016 on the date the Applicant filed its returns. Wegkamp says a response was filed on 25 February 2016 by uploading the documents on the Respondent's e-filing system. The response included a tax type report (schedule) with a title "**Standard-rated output tax**, reflecting a total amount of R2 500 inclusive of vat of which R307.00 is a tax amount, for drug testing services and another subtitle **'Vat -Standard-rated-input tax** reflecting a total amount of R461 950.70 of which R56 730.44 is a tax amount. Invoices with a number 01/RVR/2016 to Rainbow Valley Rides for $9000.00 with no date of issue or due date and 01 Alpine/2016 to Alpinet Amusement Company issued on 25 November 2015 for R $49 181.00 with a due date of 10 December 2015, were attached. It also reflected a total amount of $58 000.00 (R833 883) to be in a Standard Bank account. The amounts on these invoices are not reflected in the Tax type report. Invoices of domestic services and goods, inter alia, Jetline.com for

R13 221.36, Metwest Clothing R26 073.63, Bok Radio R34 200 and Lexus R16 54985 were also attached. The VAT 201 Vendor Declaration however reflects a zero rated (**excluding goods exported**) amount of R836 834.00 and a total input tax / Vat refundable amount of R56 423.44,

[10] The Applicant similarly did not respond to the repeat notice and reminders it received on 4 and 25 April 2016 and **finally on 7 July 2016,** subsequent to the filing of the aforementioned documents. Wegkamp submits that the Applicant's accountant, Louis Crafford made enquiries afterwards, on 18 May 2016 and was advised for the first time that the matter was with the auditors and to wait until they have contacted the Applicant, notwithstanding the Respondent's mentioned notices indicating otherwise.

[11] On 22 July 2016 the Respondent raised VAT assessments for the December 2015 and January 2016 VAT periods. An amount of R241,968.55 was said to be due to the Respondent for the November 2015 VAT period and R56 423.66 for the January 2016 VAT period. The stated reason for the reassessment was that **the burden of proof was not discharged for zero-rating the services**. The reports on the outcome of the verification in which the assessment is raised were almost similar on both assessments. On the December 2015 VAT period assessment, the report stated that:

> "**As a result of either a review of your return, an audit or finalisation of a dispute,** an assessment has been raised for the 2015 November tax period. The balance of this tax period reflects an amount of R241 968.55 payable, ...
>
> **Below is the assessment summary information** indicating **the amounts** adjusted, the adjustment **reason** and **grounds for this assessment** in calculating this assessment.
>
> ***If you are unsure as to how the assessment was concluded or the reasons for any of the adjustments made,*** **you may write a letter requesting SARS to provide further information as to how the assessment was concluded,...**
>
> **If you are otherwise dissatisfied with the assessment, you may submit a Notice of Objection (ADR1 form)...** You have 30 working days from the date of this assessment in which to do so."

[12] The Applicant was given an opportunity to interrogate the assessment by either requesting more information or an explanation on the process that was applicable and the reasons for the adjustments, if it is still unsure after receiving the outcome of the verification audit. The Applicant requested no further information.

[13] The assessment and the cause of liability is alleged by Wegkamp to have been as a result of the **reclassification** of an amount **of R2 509 200.00** entered by the Applicant into its December 2015 VAT 201 declaration as **a zero-rated output**

tax supplies **to standard-rated supplies**. Wegkamp submits that he took a view that no such reclassification has ever happened before and therefore the auditors must have committed an error. Ignoring the fact that there were no documents before the Respondent that supported the amount's classification as a zero-rated output tax in Applicant's self assessment.

[14] Wegkamp alleges that the Respondent failed to notify the Applicant within 21 days of raising the assessment or any other period as provided in s 42 (1) (b) of TAA **when the audit identified the potential adjustments of a material nature** or, to provide the Applicant as required in terms of s 42 (3) of the TAA, with a document containing the outcome of the audit including grounds for the proposed assessment or decision referred to in section 104 (2) for its response to the facts and conclusions set out in the document. He argues that section 42 (3) is mandatory and the procedure material and therefore the issuing of the assessment was procedurally unfair.

[15] The court is implored not to be concerned with the merits of the assessments raised or the basis of the objections to the assessments but only consider whether the assessments were indeed not lawfully issued (procedurally), which the Applicant alleges were *ultra vires* the TAA, and on that basis to order a payment of the refund from its self-assessment despite such having become a matter of verification and subsequently of dispute. The Applicant's counsel argued that the court has power to order the payment.

[16] Generally, and in terms of s104 of the Tax Administration Act, a taxpayer who is aggrieved by an assessment may object to that assessment. The objection is to be lodged within 30 working days from the date of assessment (in casu its 22 July 2016- the due date being 26 August 2016 for November 2015 period), unless if a taxpayer had requested reasons, it would then be 30 days of either the date of notice issued by the Respondent that it had provided adequate reasons or the date the reasons were furnished by the Respondent (both scenarios not applicable *in casu*). If there is a delay in the submission of the objection, reasons for the delay of exceptional circumstances must be provided. On the VAT returns of January 2016 the due date was 1 September 2016.

[17] Wegkamp alleges that Crafford lodged an objection to the July assessments on 5 September 2016 which he **argues was within the 30 days period afforded by the assessment. The alleged objection** is a letter written by Crafford with a caption "lodging a complaint and a request for amendment. In the letter he **states** that **the revenue reclassified by the Respondent as standard rated was in connection with services rendered to foreign customers and accordingly fell to be zero-rated in accordance with s 11 (2) (l) of the Value Added Tax Act 89 of 1991 ('VAT Act"). Section 11 (2) has been amended.**

[18] The purported objection was not in the prescribed form as required by Rule 7 (2) (a) of the Rules promulgated under s 103 of the TAA published in Government Notice 550 on 11 July 2014 ('the Rules") but a letter. It was also not in compliance with the instruction repeated twice in the Notice of Assessment to which Crafford was supposedly responding. The Applicant was duly notified repetitively in the instruction of the ADR1 Form it needed to complete in full and submit to lodge an Objection. The letter is not only a wrong format but also there is no indication of how it was delivered, whether electronically, or by post, fax or hand. Since there is also no acknowledgement of receipt, a transmission note/receipt or registered slip, there is no proof that the letter was sent. Even if there is proof, the delivery of a letter contrary to the instruction in the Notice of Assessment remains indefensible. Allegations of ignorance by Crafford, an accountant, are consequently not sustainable.

[19] The required ADR1 **Notice of Objection Form was only submitted on 10 November 2016, w**hich was late. The Applicant was in terms of s 218 (2) (e) and (g) required to state exceptional circumstances that led to the late lodging of its objection for the delay to be condoned. The exceptional circumstances or reasons the Applicant furnished for the delay was that "we tried contact with SARS previously but it failed." It repeated its ground for objection to the assessment raised that the services were supplied to none residents of the Republic who are foreign customers, therefore zero-rated. The process followed in raising the assessment was not mentioned or challenged.

[20] On 27 January 2017 the Applicant received the Respondent's Notice of Invalid Objection ("NIO") which stated that no exceptional circumstance were provided for the delayed Notice of Objection ("NOO") and therefore the dispute was not going to be processed. Furthermore the Applicant was again asked to submit a detailed schedule/report for the zero-rated sales (which the Applicant never submitted), attaching five highest value zero rated tax invoices and **export documentation** for the zero rated tax invoices.

[21] The Applicant had undeniably failed to satisfactorily provide exceptional circumstances for its delayed Objection. There is no elaboration or evidence submitted on how and when was its attempt to contact SARS and how it failed.

[22] In *ABC (Pty) Ltd v The Commissioner for the SA Revenue Service* (ITC Case Number: 0038/2015), the South Gauteng Tax Court had to consider the meaning of the provision on exceptional circumstances. The court held that in order to satisfy the 'exceptional circumstances' requirement in s104(5)(a), the onus was on the taxpayer to prove that there were "...unusual facts...which have a causal connection to the delay which resulted". As a result Applicant's contention of the Respondent's NIO and its seeking that the NOI be set aside had no merit and its abandonment under the circumstances sensible.

[23] The NIO informed the Applicant of the option to file a new NOO within 20 business days of the date of the Notice that is provided for under Rule 7 (4), with the information required for the matter to be properly and favourably considered. Also that an assessment raised in connection with an invalid invoice cannot be objected to. However, one may claim such invoice in subsequent tax period in terms of provisions of s 16 (3) (g) when a valid tax invoice is obtained. The Applicant exercised the option to file a new NOO on 24 February 2017 attaching thereto extra invoices. The new NOO is pending before the Respondent which more so made the seeking of an order setting aside the Respondent's NIO unreasonable.

[24] In respect of the order it only now seeks, the setting aside of the assessments based on its challenge on the legality of the procedure followed by the Respondent, Applicant argued that s 42 (3) is mandatory on assessment. It was to be notified that the audit had been completed or afforded an opportunity to respond to the audit findings. Instead on the strength of the assessment the Respondent proceeded to set-off the refunds owed to it against the zero- rated supplies in previous tax periods.

[25] The Applicant alleges that s 42 (2) (b) compels the official responsible for an audit to provide the taxpayer with a report indicating the stage of completion of the audit. Where the audit identifies potential adjustments of a material nature, the Respondent is required to provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision. It is argued that as that did not happen, the court must set aside the assessment which includes the setting aside of the set-off or corrective payment the Respondent decided to implement.

[26] It is further argued that once the report was made available the Applicant was entitled to be afforded a period of 21 business days to respond in writing, to the facts and conclusions in the audit report. If it was given the opportunity it would have understood the outcome and made representations before the decision was taken. Now once the assessment was raised, payment became due putting Applicant at risk of interest and penalties.

[27] Section 42 reads:

> (1) A SARS official involved in or responsible for an audit under this Chapter must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a report indicating the stage of the completion of the audit.
>
> (2) Upon the conclusion of the audit or the criminal investigation; and where-
>
> (a) the audit or investigation was inconclusive...; or

(b) the audit identified potential adjustments of a material nature, SARS must within 21 days business days, or the further period that may be required based on the complexities of the audit, provide the taxpayer with a document containing the outcome of the audit, including the grounds for the proposed assessment or decision referred to in the section 104 (2).

(3) Upon receipt of the document described in subsection (2) (b), the taxpayer must within 21 business days of delivery of the document, or the further period requested by the taxpayer that may be allowed by SARS based on the complexities of the audit, respond in writing to the facts and conclusions set out in the document.

(4) The taxpayer may waive the right to receive the document.

(5) **Subsection (1) and (2) (b) do not apply if a senior SARS official has a reasonable belief that compliance with those subsections would impede or prejudice the purpose or outcome of the audit.**

(6) SARS may under the circumstances described in subsection (5) issue the assessment or make the decision referred to in s 104 (2) resulting from the audit and the grounds of the assessment or decision must be provided to the taxpayer within 21 business days of the assessment or the decision, or the further period that may be required based on the complexities of the audit or the decision.

[28] In line with the provisions of s 42 (1) that a SARS official involved in or responsible for an audit must, in the form and in the manner as may be prescribed by the Commissioner by public notice, provide the taxpayer with a report indicating the stage of the completion of the audit, a Public Notice No. 788 was published on 1 October 2012 in Government Gazette No. 35733 for that purpose. In terms thereof, a taxpayer is entitled to a status update of the audit within 90 days after commencement of the audit and within 90 day intervals thereafter. The 'days' indicate calendar days. According to the Public Notice the update or report must include the following details as at the date of the report:

(i) A description of the current scope of the audit;

(ii) The stage of completion of the audit;

(ii) Relevant material still outstanding from the taxpayer.

[29] Section 42 imposed a duty on the Respondent to keep the taxpayer informed during an audit and to provide a timeline on the periods the audit could take to complete. Its promulgation was brought about by a need to improve on the taxpayer's rights and curb the injustices that may result from an audit that may take place **without the knowledge of the taxpayer or affording it an opportunity to make submissions with regard thereto.**

[30] One of the obvious ways a taxpayer may seriously be harmed is the warning written on the Notice of assessment that the taxpayer's obligation to pay the outstanding amounts reflected on the assessment by the due date is not suspended by any objection or appeal process. So to subvert the taxpayer being taken by surprise by such a huge responsibility or liability, notification in this instance would be crucial.

[31] In this matter the Respondent issued a Notice of Verification of VAT on 10 December 2015 for the tax period November 2015 that informed the Applicant that its VAT declaration has been identified for verification the reason or ground thereof being variances that were detected in its submission. The Applicant was requested to furnish the zero-rated output and input schedules, all documents relating to capital expenditure claimed (if applicable) and other transactional documents that would substantiate any increase/decrease in sales, inventory, change in use or bad debts. The information was to be submitted with the original notification letter sent to the Applicant and the material requested in A Format.

[32] The Notice and request for information issued to the Applicant were in terms of s 40 **which allows** SARS to randomly or on a risk assessment basis or on the basis of any consideration relevant for the proper administration of a tax Act, select a person for inspection, verification or audit. After selection, the Applicant was accordingly informed or notified of the selection and reasons thereof (that there were discrepancies in his VAT declarations and schedule. The notice called for a review of its self assessment and submission of relevant zero-rated output tax documentation, as Respondent is entitled to do in terms of s 46 of TAA. This conforms with the requirement to inform the taxpayer of variances in its self assessment that may lead to modification or amendments and to request it to furnish corroborating information, documents and comments before assessment by Respondent.

[33] The taxpayer's timeous compliance with all requests for information or action is of paramount importance in facilitating a speedy conclusion of the verification audit conducted in terms of s 40. Failure to file a response either submitting a request for correction or the relevant material in the manner instructed results in the Respondent raising an assessment based on the information at hand, as in this matter. Once the verification was finalised and the taxpayer is not in agreement with the assessment or decision, it may lodge an objection **on the prescribed form** NOO (DISPO1) via e-filing as it happened in this matter.

[34] The Applicant was repeatedly notified and requested to respond accordingly, which Respondent can do if not satisfied with the initial response it received from the Applicant. There was no response. Applicant received a final notice of its failure to respond or request the correction of its November VAT201 declaration on 25 April 2015 and on the January 2016 VAT 201 on 7 July 2016.

[35] Subsequent to the final notification, the Respondent completed the verification audit based on the information at hand, raising an assessment of which the Applicant was notified on 22 July 2016. The notice to Applicant reported on the outcome to enable the Applicant to respond indicating the amounts allegedly due to the Respondent. It provided a summary of information indicating the grounds for assessment, amounts adjusted, the reason for the adjustment. The Applicants was given 30 days within which to respond to the raised assessment.

[36] The Applicant duly raised an objection to the assessment, albeit incorrectly and did not challenge the Respondent's procedure that led to the raising of an assessment or request any further explanation on the assessment. The Applicant had however after receiving the NIO proceeded to exercise an option of filing another objection, which is now pending. On that basis the order for setting aside the assessments and payment of the refund seems rather premature and overreaching. It impacts on the substance of the matter when the alleged illegality affects only a process that is still pending.

[37] It is also unfair on one hand to raise an issue on review which the Applicant did not insist on, or object to and seemingly excused whilst on the other hand the process it has proceeded with or taken against the assessment (Objection) is still pending. The Applicant has therefore not made a case for the interference of the court before the valid internal process is finalised; see unreported judgment of this Division in *Medox Ltd v CSARS* (49017/11) [2014] ZAGPPHC 98

[38] In terms of s 7 (2) (a) of PAJA, 'no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.'

[39] It also goes without saying that without having dealt with the merits of the assessment, making an order as prayed by the Applicant, directing the Respondent to pay the refund for the VAT periods November 2015 and January 2016 on which it has raised an assessment, would amount to interference with the Respondent's tax administration. Furthermore the issue that has also arisen with regard to the nature of the VAT applicable, needs to be resolved in the tax court; see *MTN v SARS* [2013] 75 SATC 171.

[40] Notwithstanding my aforesaid sentiments, I find it iniquitous and excessive that whilst the process of objection is still pending, the Respondent proceeded to effect a set-off payment, especially under circumstances where the Applicant was not alerted or afforded an opportunity to make submissions to Respondent's intention to implement a corrective payment after the assessment. It would therefore be just and curb any prejudice on the Applicant if the effect of the decision to set-off is suspended pending the outcome of the process of objection and for the Applicant to be afforded an opportunity to comment or make submissions on the set-off.

[41] Under the circumstances an order as follows would be appropriate, just and equitable:

[41.1] The Application for an order to set aside the assessments raised on 22 July 2016 is refused.

[41.2] The matter is referred back to the Respondent for finalisation of the pending process of Objection, that is the Respondent's consideration of Notice of Objections filed by the Applicant on February 2017.

[41.3] The set-off payment effected by the Applicant is suspended pending finalisation of the Objection process whereby:

[40.3.1] The Applicant is to make submissions on the implementation of the corrective payment (set-off) within 20 days of receipt of Respondent's response to its Objection.

N V KHUMALO J

JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA

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