

SOUTH AFRICA / JUDGMENT

Commissioner for the South African Revenue Service v Char-Trade 117 CC t/a Ace Parking (776/2017) [2018] ZASCA 89; 81 SATC 18 (31 May 2018) [2018] ZASCA 89

COURT

Supreme Court of Appeal

BEFORE

Navsa, Lewis, Mbha, Davis, Schippers

CASE / FILE NUMBER

776/2017

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THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 776/2017

In the matter between:

THE COMMISSIONER FOR THE

SOUTH AFRICAN REVENUE SERVICE

APPELLANT

and

CHAR-TRADE 117 CC t/a ACE PACKAGING

RESPONDENT

Neutral citation: CSARS v Char-Trade (776/2017) ZASCA 89 (31 May 2018)

Coram: Navsa, Lewis and Mbha JJA and Davis and Schippers AJJA

Heard:

21 May 2018

Delivered: 31 May 2018

Summary: Assessment issued for secondary tax on companies (STC) – S 64B and 64C of the Income Tax Act – Commencement of prescription – S 99 of the Tax Administration Act
Prescription commences to run against CSARS when return for STC is submitted by the taxpayer -
Return for STC never submitted by taxpayer – Prescription never commenced to run against CSARS – Assessment confirmed.

ORDER

On appeal from: Tax Court, Johannesburg (Jansen J sitting as a court of first instance).

1 The appeal is upheld,

2 The order of the court a quo is set aside and replaced with the following:

‘The assessment of the dividend cycle ending in the 2007 year of assessment is confirmed.’

3 The respondent is ordered to pay the costs of this appeal.

Mbha JA (Navsa, Lewis JJA and Davis and Schippers AJJA concurring):

- [1] This appeal concerns the question, whether an assessment issued for secondary tax on companies (STC) in respect of the dividend cycle ending in February 2007, which was levied in terms of ss 64B and 64C of the Income Tax Act 58 of 1962 (the ITA), had become prescribed in terms of s 99 of the Tax Administration Act 28 of 2011 (the TAA). The appeal is against the judgment and order of Jansen J, sitting with assessors, in the Tax Court, Johannesburg, in terms of which it was held that prescription for the STC assessment commenced running from 31 March 2007 and that, as the assessment was issued on 19 November 2012, it had prescribed. The appeal is with the leave of the Tax Court.
- [2] The factual matrix from which the dispute arose can be described as follows: During the 2007 to 2011 years of assessment the respondent, Char-Trade 117 CC t/a Ace Packaging (Char-Trade), made various loans to related close corporations and companies within its group of companies. These loans were reported by Char-Trade in its annual financial statements and described as follows: ‘unsecured, bear interest at current rates and have no fixed terms of repayment’.
- [3] During an audit by the appellant (CSARS) of Char-Trade’s tax affairs, it was discovered, so CSARS alleged, that the latter had provided interest free loans or loans to a number of related close corporation and companies. CSARS subjected the loans to STC on the basis that these loans constituted deemed dividends, as less than the official rate was charged. As a result of the non-payment of STC by Char-Trade, CSARS also levied interest in terms of s 64B(9) of the ITA on the capital amounts owed by it.

[4] On 9 November 2012, CSARS issued assessments for STC against Char-Trade for the 2007 to 2011 STC cycles, in terms of s 64C(2)(g) of the ITA. The adjustments made by CSARS in the revised assessment resulted in Char-Trade's total tax liability for payment of STC in the amount of R4 653 870.20. Of this amount, R1 812 609.00 was in respect of Char-Trade's STC liability for the 2007 STC cycle.

[5] On 12 December 2012 Char-Trade filed a Notice of Objection against the assessments on the basis that s 64C(2)(g) of the ITA was not applicable, as the loans it had made to independent companies were not made to connected persons as defined

in the ITA. CSARS disallowed the objection on 18 January 2013, having regard to s 64C(2)(g), read together with the definition of 'connected person'.^[1]

[6] On 11 April 2013, Char-Trade lodged an appeal against the disallowance of its objection. In the Notice of Appeal (ADR 2), Char-Trade conceded that the loans were made to 'connected persons' as defined in the ITA. Char-Trade contended, however, that the loans made to connected persons during the years of assessment, bore interest that was not less than the official rate of interest. Thus, it contended, s 64C(4)(d) of ITA was inapplicable and that no STC was payable.

[7] On 17 June 2014, Char-Trade, relying on the provisions of s 99 of the TAA, introduced a new and additional defence namely, that the assessment for 2007 had become prescribed and fell to be set aside in its entirety. I will return to this aspect shortly in fuller detail, as the 2007 year of assessment became, ultimately, the only focus of this appeal.

[8] Shortly, before the commencement of the trial in the court a quo, Char-Trade made a 'with prejudice' offer of settlement to CSARS, contained in a written letter dated 5 May 2015, in which it stated:

'1.3 The Appellant [Char-Trade] concedes the appeal except for the 2007 year of assessment. The appellant will argue that the time period for raising the assessment for 2007 had prescribed;

1.4 The Appellant will not be proceeding with the appeal on the merits.

2. Please acknowledge receipt hereof and advise the Court of the above so as to prevent any unnecessary preparation being done before trial date.'

[9] Indeed, when the trial resumed on 9 December 2015, Ms Dreyer, appearing for Char-Trade, addressed the court stating:

'So, M' Lady, consequently, the only matter for determination by this Court is the question of the 2007 year of assessment, whether in fact that has become prescribed. At the initial hearing in May, I indicated to your Ladyship that the further years of assessment, 2008, '09, '10 and '11, had been conceded. So that is the only issue that is for determination. (My emphasis).

[10] In the light of what I have said, it is clear that, save for the singular issue relating to the prescription of the assessment in respect of the 2007 STC cycle, Char-Trade effectively conceded the entire merits of the appeal. Therefore, the only issue in dispute is whether CSARS was prohibited by s 99(1)(b) of the TAA from issuing the assessment for STC in respect of the dividend cycle that ended in 2007. This would be the case if more

than five years have lapsed since the date of assessment of the original assessment. Ms Dreyer was constrained to concede this fact.

[11] In finding that the 2007 assessment had prescribed, the court a quo reasoned as follows: Char-Trade's dividend cycle coincided with its financial year end, being 27 February each year. Accordingly, the STC return and payment in respect of the loans advanced by Char-Trade should have been submitted and paid by no later than 31 March 2007. Char-Trade's dividend cycle for the 2007 year of assessment was deemed to be declared on 27 February

2007. So it was from the date for the filing of the STC return that an obligatory payment is determined in terms of s 64B(7) of the ITA.

[12] The Tax Court then concluded that, as the assessment for 2007 was raised on 9 November 2012, more than five years after the return and payment were deemed to be due in terms of s 64B(7), the 2007 assessment had become prescribed.

[13] The issue as to whether or not the 2007 assessment has prescribed must be determined against the backdrop of the following factors, which are common cause. In the 2007 income tax return interest payable to the taxpayer by connected persons is stated to be R2 160

868. In the amended Annual Financial Statement for 2007, dated 12 June 2014, interest received from connected persons is reflected as R8 273 267. Char-Trade never submitted any return in respect of STC in respect of the dividend cycle ending in

2007. Furthermore, no payment of STC has been made in respect of the 2007 year.

[14] Before I consider the parties' submissions on appeal, it bears mentioning that Char-Trade bears the onus in terms of s 102(1)(a) of the TAA, to prove that it is not liable for STC for 2007, and must prove prescription. To do so, Char-Trade must prove the jurisdictional facts required in terms of s 99(1)(b) of the TAA namely, that five years have expired after the date of assessment of an original assessment.

[15] Char-Trade's submissions regarding prescription can be summarised as follows: (a) If there had been an obligation on

Char-Trade to render a return and pay STC as contended by CSARS, then the payment accompanied by the return should have been made to CSARS by 31 March 2007; and (b) the assessment in respect of STC for 2007 was issued on 9 November 2012, more than five years after the end of the deemed dividend cycle. Accordingly the assessment had become prescribed.

[16] Ms Dreyer also attempted to proffer an alternative argument based on s 64C(4)(d) of the ITA, namely, that the loans that Char-Trade made to connected persons bore interest at a flat rate of 10%. As this rate was not less than the prescribed rate of interest in the 2007 dividend cycle, there was in terms of s 64C(4)(d) of the ITA, no obligation on Char-Trade to render a STC return or pay any tax as a consequence of a deemed dividend.

[17] In my view the alternative argument was no more than an attempt to re-introduce the merits of the appeal in respect of the 2007 assessment for STC through the back door. As I have said above, this aspect was squarely conceded on 5 May 2015. It is not before this court and nothing further need be said on this aspect.

[18] The assessment in respect of STC for 2007 was issued in terms of s 64C(2) of the ITA, which read:

‘For the purposes of s64B, an amount shall, subject to the provisions of subsection (4), be deemed to be a dividend declared by a company to a shareholder, where –

. . . .

(g) any loan or advance is granted and made available to that shareholder or connected person in relation to that shareholder’.

[19] Char-Trade was obliged in terms of s 64B(7) of the ITA to submit a return for STC for 2007. At the relevant time this section provided:

‘The secondary tax on companies shall be paid to the Commissioner by the company liable therefor by not later than the last day of the month following the month in which the dividend cycle relevant to such dividend ends and each payment of such tax shall be accompanied by a return in such form as the Commissioner may require’.

[20] There was no dispute that the return that was required in terms of s 64B(7) of the ITA constituted a ‘self-assessment’. This is defined in of the TAA to mean:

‘determination of the amount of tax payable under a tax Act by a taxpayer and –

(a) submitting a return which incorporates the determination of the tax; or

(b) if no return is required, making a payment of tax’.

Clearly, Char-Trade was under an obligation to submit a return but failed to do so.

[21] What remains to be determined is, when did the five year prescription period commence running? Section 99(1) of the TAA states that:

‘An assessment may not be made in terms of this Chapter –

(b) in the case of self-assessment for which a return is required, five years after the date of assessment of an original assessment –

- (i) by way of self-assessment by the taxpayer; or
- (ii) if no return is received, by CSARS’.

[22] Section 1 of the TAA defines, in relevant part, ‘date of assessment’ to mean:

‘(b) in case of self-assessment by the taxpayer –

- (i) if a return is required, the date that the return is submitted’.

[23] The intended effect of s 99(1)(b) of the TAA, read with the definition of ‘date of assessment’, is that prescription cannot commence to run against CSARS until such time as a return has been submitted by the taxpayer. It is by submitting a return that the taxpayer informs CSARS about a dividend, including a deemed dividend, and that STC is payable thereon.

[24] It follows that prescription in respect of the dividend cycle of 2007 could only have commenced once Char-Trade had filed a return for STC. Having conceded the merits of the assessment for all the years in question Char-Trade acknowledged it was liable for STC and was obligated to file the return for all these years including the 2007 year of assessment. This return would have constituted the original assessment. As Char-Trade failed to submit the STC return, there was no original assessment from which assessment date the five year period could have run.

[25] In the light of what I have stated, it becomes apparent that prescription never commenced to run. It could only have commenced in the event that Char-Trade filed a return for STC which it failed to do. For this reason, the court a quo erred when it held that prescription commenced in March 2007, which being one month following the dividend cycle for 2007 and which was the date when Char-Trade was obliged to file a STC return and make payment. The appeal must accordingly succeed.

[26] I make the following order:

- 1 The appeal is upheld,
- 2 The order of the court a quo is set aside and replaced with the following:
- 3 The respondent is ordered to pay the costs of this appeal.

B H Mbha

Judge of Appeal

APPEARANCES:

For Appellant:

C Louw SC

Instructed by:

The State Attorney, Pretoria

The State Attorney, Bloemfontein

For First Respondent:

CJ Dreyer

Instructed by:

Fluxmans Attorneys, Johannesburg

Lovius Block, Bloemfontein

- [1] A connected person is defined in section 1 of the ITA to include a close corporation which is a connected person to any member. It is common cause that the members of Char-Trade and the members of the related entities to whom the loans were advanced have either the same members or shareholders.
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