

SOUTH AFRICA / JUDGMENT

Top Watch (Pty) Ltd v Commissioner of the South African Revenue Service (2017/4557; 2016/90099) [2018] ZAGPJHC 470; 80 SATC 448 (12 June 2018) [2018] ZAGPJHC 470

COURT

South Gauteng High Court, Johannesburg

BEFORE

Roland Sutherland

CASE / FILE NUMBER

2017/4557; 2016/90099

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Source record

REPUBLIC
OF SOUTH AFRICA
THE HIGH COURT OF
SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
JOHANNESBURG
CASE NO: 2017/4557
PRETORIA
CASE NO: 2016/90099
NOT
REPORTABLE
NOT
OF INTEREST TO OTHER JUDGES
REVISED.
In

the matter between: TOP
 WATCH (PTY)
 LTD Applicant
 and
 THE
 COMMISSIONER OF THE SOUTH AFRICAN
 REVENUE
 SERVICE Respondent

JUDGMENT

Headnote – claim by taxpayer that VAT refund be paid – opposed by SARS on basis a set of other alleged ‘tax debts’

- no evidence adduced to prove the existence of another ‘tax debt’ available to be set off – interpretation of section 190(2) of Tax Administration Act - until such time as the alleged income tax liability is captured in an assessment and communicated to the applicant, it is premature to plead a set off - no allegation made that such an assessment has been presented to the applicant – SARS ordered to pay sums it admitted were due to be refunded

SUTHERLAND J:

Introduction

- [1] This is case about whether or not the respondent is legally justified in refusing to pay certain value added tax (VAT) refunds to the applicant, a taxpayer.
- [2] The case has had a convoluted and protracted history with several supplementary affidavits to track its evolution. Mercifully, the various metaphorizing episodes have now crystallised into a neat contestation.
- [3] The question posed to the court is this: in respect of admitted VAT refunds due and payable, can the respondent decline to authorise payment on the grounds that a tax debt in respect of income tax has been assessed which is due and payable. The fact of such a tax debt is disputed. The principles applicable to set off are implicated as are the provisions of sections 190 and 191 of the Tax Administration Act 28 of 2011 (TAA).

An analysis of the controversy

- [4] The applicant claims four sums, plus interest; the principal sums are:
 - 4.1. R39072.53 for the vat period 2014/02
 - 4.2. R21268.87 for the vat period 2014/07
 - 4.3. R182253.12 for the vat period 2014/08
 - 4.4. R76907.80 for the vat period 2017/07.

- [5] There is no dispute that the first three sums are due and payable. As to the fourth, the respondent alleges no refund is due, rather a sum of R3991.67 was owed by the applicant which had been paid on 29 September 2017. That statement, on the application of the Plascon -Evans rule must stand.
- [6] It is common cause that notwithstanding that fact, the respondent refuses to authorise payment of what it concedes is due and payable.
- [7] On 7 June 2018, Pretorius, a legal specialist in the employ of the respondent deposed to an affidavit in which he alleges that the applicant has been assessed with an income tax liability of R1,760,432.79. To substantiate this allegation, he relies on the

supporting affidavit of Oberholzer, an operational specialist, in which it is said that he audited the 2012/03-2015/02 income tax of the applicant between 25 November 2016 until 8 March 2018. He concluded that the applicant owed income tax of R1,760,432.79 as at 16 May 2018. In order to substantiate this allegation, Oberholzer cites a document attached as POC1 [Record: page 250] That document is mostly illegible. I was told from the bar that it is an extract of the accounting system of the respondent. The heading reads: "Assessed account - remittance data view". Near the bottom is a figure that can be made out to read, probably, R1,760,432.79.

- [8] Upon these facts the respondent contends the refusal to pay is legally correct, because there either there has been a set-off of this income tax liability, as evidenced, against any vat refund indebtedness. It is contended on behalf of the applicant that this stance by the respondent is wrong in law, but as regards the facts, it is argued that it constitutes an unequivocal acknowledgement that the vat refunds are due and payable, because that would be a precondition for set-off to operate. This submission must be correct.

- [9] The duty to refund tax overpaid is regulated by section 190 of TAA. That section provides:

"Refunds of excess payments:-

- (1) SARS must pay a refund if a person is entitled to a refund, including interest thereon under section 188 (3) (a), of—
- (a) an amount properly refundable under a tax Act and if so reflected in an assessment; or
 - (b) the amount erroneously paid in respect of an assessment in excess of the amount payable in terms of the assessment.
- (2) SARS need not authorise a refund as referred to in subsection
- (1) until such time that a verification, inspection or audit of the refund in accordance with Chapter 5 has been finalised.
 - (3) SARS must authorise the payment of a refund before the finalisation of the verification, inspection or audit if security in a form acceptable to a senior SARS official is provided by the taxpayer.

(4)(5A)

(6) A decision not to authorise a refund under subsection 1(b) is subject to objection and appeal.

[10] The critical contention of the respondent is founded on section 190(2) which states “ SARS need not authorise a refund as referred to in subsection (1) until such time that a verification, inspection or audit of the refund in accordance with Chapter 5 has been finalised.”

Premised on this provision, the respondent contends that what Pretorius and Oberholzer attests to, seals the fate of the case against the applicant.

[11] The answer to this thesis, as advanced on behalf of the applicant, is twofold. First, a textual interpretation of section 190(2) and second, the contention that no tax debt is established on the papers, thus by an application of the principles of set off, there cannot be a set off against the admitted indebtedness in respect of the vat refunds. I deal with each argument in turn.

[12] It is contended that a reading of section 190(2) demonstrates that the “verification, inspection or audit” referred to therein does not apply to all and any aspect of a taxpayer’s tax affairs. Rather it is narrowly focussed on the “refund” itself. The implication of this perspective is that the power to refuse to pay a refund is limited to an examination of the contemplated refund itself. Accordingly, an examination of income tax affairs of the taxpayer cannot be relevant as a brake on the invocation of section 190(1) entitling the taxpayer to the refunds.

[13] However, independently of that perspective, to invoke section 191 to set off a tax debt against a refund, a existing tax debt has to be proven. That section provides:

“191. Refunds subject to set-off and deferral.— (1) If a taxpayer has an outstanding tax debt, an amount that is refundable under section 190, including interest thereon under section 188 (3) (a), must be treated as a payment by the taxpayer that is recorded in the taxpayer’s account under section 165, to the extent of the amount outstanding, and any remaining amount must be set off against any outstanding debt under customs and excise legislation.

(2) Subsection

(1) does not apply to a tax debt—

(a) for which the period referred to in section 164 (6) has not expired or suspension of payment under section 164 exists; or

(b) in respect of which an instalment payment agreement under section 167 or a compromise agreement under section 204 applies.

(3)....”

[14] It is contended that POC 1 is not an assessment and only an assessment which has been communicated to the taxpayer is eligible

for a set off.

14.1. The meaning of an assessment was addressed in *CSARS v SA Custodial Services (Pty) Ltd* 2012 (1) SA 522 (SCA). At [29] it was held that:

“An assessment is defined in s 1 of the [Income Tax] Act as '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 s 106(2) . . . of an amount upon which any tax leviable under this Act is chargeable'. In ITC 17406 Galgut DJP held that in order to fall within this definition, 'what is required is at least a purposeful act, one whereby the document

embodying the mental act is intended to be an assessment'.”

14.2. A tax debt is defined in section 169(1) of TAA. It provides “An amount of tax due or payable in terms of a Tax Act is a tax debt due to SARS...” The appropriate enquiry is into the effect of the document, if any, put up to allege an indebtedness in the form of an assessment. In *Singh v CSARS* 2003 (4) SA 520 (SCA) at [14] – [17] the Court held that:

“[14] The Act predicates the bringing into existence of an assessment prior to the lodging of the statement under s 40(2)(a). That is apparent from s 40(5). The phrase used in the last-mentioned subsection is 'any assessment upon which such statement is based' not any assessment upon which it may be based. The reason is obvious. If the position were otherwise, the Commissioner could obtain a civil judgment with all the consequences

that that entails, including the possibility of sequestration in terms of s 40(2)(c), without informing the taxpayer how he arrives at the amount of such assessment.

[15] Albeit that an assessment may be 'a mental act in the nature of a decision' per Schreiner JA in *Irvin and Johnson (SA) Ltd v Commissioner for Inland Revenue* 1946 AD 483 at 494, counsel's submission that it is sufficient for the assessment to exist purely in the Commissioner's head cannot be correct; the law is not generally concerned with thoughts but with their outward manifestations and, in the context of s 40(1), the tax cannot be regarded as having become recoverable through judicial intervention until the taxpayer has been informed of the assessment, a subject to which we shall return.

[16] Section 31(4) requires the Commissioner to give written notice of the assessment to the taxpayer concerned. There can thus be no suggestion that, as between the two parties, any secrecy attaches to a completed assessment.

[17] The primary purpose of giving notice of the assessment is not objection and appeal but payment by the taxpayer. ”

14.3. It is trite that set off requires debts between persons who (1) have reciprocal debts,

(2) both debts being due and payable,

(3) and both debts being liquidated. (See the authorities cited in Coaker & Zeffert, Wille and Millin's Mercantile Law of SA, 18th Ed, (1984) Juta. At 164-166)

[15] Accordingly, the argument runs, even on the respondent's version no evidence is adduced to prove the existence of a tax debt available to be set off. In other words, until such time as the alleged income tax liability is captured in an assessment and communicated to the applicant, it is premature to plead a set off. There is no allegation that such an assessment has been presented to the applicant.

Conclusion

[16] I find that no tax debt is established on these papers and therefore, no set off can operate against the admitted debts. An order requiring the respondent to pay admitted debts is appropriate.

The Costs

[17] The applicant, being aggrieved about the way in which the parties have sparred since the inception of the proceedings, sought a punitive costs order. This was founded mainly on the changing rationale offered to refuse to pay the refunds. This stance, irritating as it may be, can also be understood as a practical stance, engaging with the taxpayer to resolve the real issues, rather than stonewalling on untenable grounds. This case evolved over time so that the issue put up for decision is materially different to what was initially in issue. I not persuaded that these circumstances evidence grounds for a punitive order.

Additional documents

[18] Whilst writing this judgment the respondent attempted, unilaterally, to present me with a further document. This is inappropriate, and I have had no regard to material not properly admitted into the record.

The Order

It is ordered that:

1. The respondent authorise and refund the applicant the value added tax refunds in respect of the VAT periods

1.1. 2014/02 in the sum of R39 062.53,

1.2. 2014/07 in the sum of R21 268.87,

1.3. 2014/08 in the sum of R182 253.23,

2. The respondent pay interest on those amounts at the prescribed legal rate from:

2.1. 10 October 2016 (the date of assessment) to date of payment

2.2. 10 October 2016 (the date of assessment) to date of payment

2.3. 21 October 2016 (21 days from 30 September 2016, being the date of submission of the VAT201 return) to the date of payment;

3. The respondent pay the applicant's costs of suit

Roland Sutherland

Judge of the High Court

Gauteng Local division, Johannesburg

Heard: 7 June 2018

Judgment:

12 June 2018

For the applicant:

Adv C Dreyer instructed by Pierre Retief Inc.

For the Respondent:

Adv Molea instructed by the State Attorney.

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