REPUBLIC OF SOUTH AFRICA

IN THE TAX COURT OF SOUTH AFRICA

(HELD AT MEGAWATT PARK, JOHANNESBURG)

CASE NO: VAT 1712

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

In the matter between:

ABC TRADING CC Appellant

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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J U D G M E N T

Windell J.

INTRODUCTION

[1] The appellant, ABC Trading CC ("ABC"), is a registered micro refinery with the Diamond and Precious Metal Regulator of the Republic of South Africa ("the Regulator"), and is a registered VAT vendor.

[2] ABC appealed against Value Added Tax ("VAT") assessments that the Commissioner for the South African Revenue Service ("SARS") issued pertaining to two tax periods. The first tax period ran from August 2014 to March 2015, and the second tax period ran from December 2015 to March 2016. Different questions have arisen in respect of each VAT period.

[3] The core issue relating to the first tax period, namely whether supplies were made to the appellant by two specific suppliers, X Gold and Z Gold, has been dealt with in a separate judgment. The issues relating to the second period, and the subject of this judgment, concerns the decision by SARS to raise additional assessments after it made payment to ABC in terms of a court order; to "write back" interest paid to ABC in terms of the court order; and the interpretation of section 45 of the Value-Added Tax Act 89 of 1991 ("the Act").

BACKGROUND FACTS

[4] ABC rendered VAT returns for the second period, i.e. the individual months running from December 2015 to March 2016. These returns reflected that SARS was indebted to ABC in an amount of R71 229 183. 86 by means of refunds. In terms of section 45(1) of the Act, SARS must, within 21 business days after the date on which the vendor's return in respect of a tax period is received, refund the vendor. SARS did not make payment of the refunds within the prescribed 21 business days and in accordance with section 45(1) was liable to pay interest. Section 45(1) provides that:

> "(1) Where the Commissioner does not within the period of 21 business days after the date on which the vendor's return in respect of a tax period is received by an office of the South African Revenue Service refund any amount refundable in terms of section 44 (1), interest shall be paid on such amount at the prescribed rate (but subject to the provisions of section 45(A) and calculated for the period commencing at the end of the first-mentioned period to the date of payment of the amount so refundable: Provided that—
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> (i) where such return made by the vendor is incomplete or defective in any material respect the said period of 21 business days shall be reckoned from the date on which—
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> (*aa*) the vendor rectifies the return and satisfies the Commissioner in writing that the incompleteness or defectiveness of the return does not affect the amount refundable; or

> (*bb*) information is received by the Commissioner to enable him to make an assessment upon the vendor reflecting the amount properly refundable to the vendor;"

[5] In May 2016, SARS's Compliance Audit Division ("the CAD") selected ABC for an audit as part of its compliance process in respect of the first and second VAT periods. An audit of limited scope was conducted by the CAD and finalised in June 2016. The audit confirmed that ABC was in a refund position for the second period. From the ongoing investigation by the CAD, SARS stated that it however identified further risks which necessitated that the matter be allocated to the VAT Investigative Audit section for a full scope audit. On 16 August 2016, the matter was allocated to Mr. B, to conduct the full scope audit into the VAT refund claims of the applicant for, *inter alia,* the second period.

[6] Whilst the full scope audit was still in progress, and on 14 September 2016, ABC instituted legal proceedings against SARS in the Johannesburg High Court,[1] applying for an order compelling SARS to pay the refund relating to the second period as well as interest on the outstanding capital refund amount. The interest component came to R3 570 115.33.

[7] SARS did not oppose the application and Mokose AJ (as she then was) granted judgment on 17 November 2016, compelling SARS to pay to ABC both the capital amount of the refunds for the VAT periods 2015/12; 2016/02 and 2016/03 as well as the interest thereon. SARS then paid the amounts of capital and interest to ABC on 1 December 2016.

[8] In the meantime, SARS continued with the audit relating to both the first period and the second period. On 7 March 2017, SARS issued assessments relating to the first and second period as defined above. In respect of the second period, the audit process revealed that ABC failed to declare deemed output tax on the use of a motor vehicle by its member. As a result SARS raised an additional assessment on the deemed output tax, in respect of the fringe benefit, as contemplated in terms of section 18(3) read with section 10(3) of the Act. In the letter of audit findings pertaining to the second period, SARS stated:

> "An audit was conducted on the output tax declared by the vendor and SARS found that the vendor did not declared deemed output tax on a fringe benefit. The vendor provided an employee of the company a right of use of a company owned Ford Ranger Wild Track. In terms of section 18(3) of the VAT Act, where an employer has granted a fringe benefit to an employee VAT is payable on the value of that benefit. Section 10(13) sets out how the value of the fringe benefit is calculated. The deemed output tax is calculated as follows: R543859,65 × 0,3% = R1 631,58 × 14 / 114 = R200,36 per month."

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[1] Case number 31842/2016.

[9] ABC objected to the fringe benefit assessments, and on 25 July 2017, SARS disallowed the objection. In respect of three tax periods falling within the second period i.e. December 2015, February 2016 and March 2016, SARS clarified, for once and for all, that it "recalled" the interest that it had paid under the judgment of Mokose AJ. SARS's justification for the "recall" of the interest was the provisions of section 45(1)(i) of the Act.

[10] ABC submitted that, given the relatively insignificant amounts of the output VAT in issue, it made no economic sense for ABC to appeal against the merits of the finding of the output tax/fringe benefit issue. However, the "recalling of the interest", in their view, was a clear attempt to "claw-back" the interest that it had paid. ABC therefore objected and appealed SARS's decision to recall the interest on the basis that the *quantum* of the output tax relating to fringe benefits (in an amount of R601,09) was "trifling and clearly immaterial", and did not constitute "material incompleteness or defectiveness" as provided for in section 45(1)(i). Consequently, so it was argued, the provisions of section 45(1)(i) did not find application.

[11] ABC also instituted parallel proceedings against SARS in the Johannesburg High Court[2] during July 2017, which proceedings, in part, dealt with SARS's attempt to recall the interest that it had paid under the Mokose AJ judgment on the basis of the fringe benefit output tax issue. One of the points raised in those proceedings was that SARS was precluded from issuing further assessments relating to the periods that fell within the second period that Mokose AJ had dealt with, on the ground that her judgment was *res iudicata* of the rights and obligations of the parties. The High Court application came before Molahlehi J. The learned judge gave judgment on 19 July 2018 and concluded that ABC could not raise the issue of *res iudicata*.

[12] ABC submitted that Molahlehi J's remarks was *obiter* as the application was not dismissed, but merely struck from the roll. It was further submitted that ABC has therefore, purely for practical purposes and reasons of expediency, decided not to persist with the *res iudicata* argument and accepts that this court has the power or jurisdiction to deal with this issue. It therefore requested the court to deal with the fringe benefit issues and to reduce the assessments relating to fringe benefits to R nil to refuse SARS the opportunity to "claw-back" the paid interest.

[13] SARS submitted that the decision to audit ABC was taken more than 15 days before ABC launched the High Court application. As a result of the audit findings, additional assessments were raised in respect of the second period. In so doing, SARS was performing its statutory duties and had an obligation in terms of section 92 of the Tax Administration Act 28 of 2011 ("the TAA"), to raise additional assessments.

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[2] Case number 40732/17.

[14] SARS contended that the order of Mokose AJ, did not prohibit SARS from raising additional assessments, which would inevitably effected the implementation of an "adjustment". It is submitted that ABC's failure to declare deemed output tax rendered the VAT returns for the second period incomplete and/or defective as provided for in section 45(1)(i) of the Act, and the "adjustment" was therefore justified. SARS further submitted that in an attempt to ensure that the interest payment made to the vendor is not negatively affected by this assessment, SARS made various proposals to ABC to raise this assessment in a period which did not have refunds. The proposals were rejected by ABC and SARS accordingly raised the assessments in the correct periods. This resulted in the reversal of interest.

EVALUATION

[15] The first question is whether SARS was entitled to raise additional assessments for the second period, after a court order was issued, ordering SARS to make payment of the refund with interest.

[16] Section 92 of the TAA reads as follows:

> **"92. Additional Assessments.—**If at any time SARS is satisfied that an assessment does not reflect the correct application of a tax Act to the prejudice of SARS or the fiscus, SARS must make an additional assessment to correct the prejudice."

[17] When ABC instituted the High Court application to compel SARS to pay the refund, the audit against ABC had not been finalized. The order of Mokosa AJ did not suspend the audit process. The ultimate finding of the investigative audit was that ABC did not declare deemed output tax on a fringe benefit on the use of a motor vehicle by its member. ABC accepted the finding on the fringe benefit. As a result of the audit findings, and in terms of section 92 of the TAA, SARS was entitled to raise additional assessments in relation to the output tax not declared.

[18] The second question before this court is thus whether ABC's failure to declare the output tax on the fringe benefit render the returns that ABC had provided for the second period "incomplete or defective in any material respect" as provided for in section 45(1)(i) of the Act, and whether SARS decision to "write back" the interest by affecting an "adjustment" was justified. To put it differently: Were the jurisdictional factors, i.e. that ABC's returns were *"incomplete or defective in any material aspect"* present for SARS to invoke the provisions of section 45(1)(i)?

[19] It is common cause that the aggregate of the fringe benefit amounts to R601,09. The capital amount of VAT that SARS was ordered to pay by Mokose AJ, was R71 229 184,00. The ratio of fringe benefit output VAT to the total amount of the refund was 1:180 000 or 0,0006%.

[20] SARS's contention is the following: ABC's failure to declare the fringe benefit amounted to non-compliance with the provisions of section 18(3) of the Act and constitutes an "error". The "error" is material to SARS and non-compliance with the relevant provisions of the tax Acts could simply not be condoned. The Commissioner is tasked with collecting all the taxes due to the *fiscus*, regardless of how "immaterial" they may seem to be. If the "error" was so immaterial, this could have easily prompted ABC to declare the output tax before it was caught by SARS.

[21] In *Qilingele v SA Mutual Life Assurance Society,*[3] the court considered the concept of materiality in a case concerning the duty of disclosure under a domestic policy. Section 63(3) of the Insurance Act 27 of 1943 provided that:

> "Notwithstanding anything to the contrary contained in any domestic policy or any document relating to such policy, any such policy … shall not be invalidated and the obligation of an insurer thereunder shall not be excluded or limited … on account of any representation made to the insurer which is not true, whether or not such representation has been warranted to be true, unless the correctness of such representation is of such a nature as to be likely to have materially affected the assessment of the risk under the said policy at a time of issue … thereof."

[22] The court held that the object of the section was to protect claimants under insurance contracts against repudiations based on inconsequential inaccuracies or trivial misstatements in insurance proposals. The *onus* to establish that a misrepresentation etc. was material rests, so the Appellate Division held, on the insurer. Kriegler AJA (as he then was) said the following about the concept of materiality at *74H:*

> "… what has to be ascertained is whether the result likely to have been caused by the misrepresentation is material. Materiality is not a relative concept; something is either material or it is not. Etymologically the word "material" ("wesenlik" in Afrikaans) denotes substance, as opposed to form. In legal parlance it bears a correspondent meaning: "Of such significance as to be likely to influence the determination of a cause … . (The Shorter Oxford English Dictionary Vol 2 at 1289.)
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> Conformably, its meaning in insurance law is significant in relation to the determination of the risk. In the subsection now being examined the adverb "materially", used in conjunction with the verb "qualifies" ("effek"), simply means that only risks undertaken on the strength of significant misrepresentations may be repudiated under the saving qualification".

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3 1993 1 SA 69 (A).

[23] Section 45 of the Act obliges SARS to refund any amount refundable in terms of section 44(1). It is not contended by SARS that the refund of the "capital" amount in issue before Mokose AJ was not refundable. SARS was thus obliged, on first principles, to make payment thereof within 21 days after the date on which ABC's returns were received. It failed to pay make payment and was liable to pay interest, except if the returns were incomplete or defective in any material respect.

[24] The sole evidence relating to the fringe benefits before the court was that of Mr B. It was put to him during cross-examination, that the amounts in question were not material. Mr B readily conceded that this was the case. He sought to justify SARS's decision to write back the interest on the basis of principle.

[25] Section 45 is a pragmatic provision not concerned with principle but with materiality. It recognises the fact that vendors may render returns that are incomplete or defective. If it were a matter of principle then any defective or incomplete return would carry the consequence of SARS not having to pay interest. But, the Legislature, in its wisdom, determined that expedience trumps principle insofar as the payment of interest by SARS is concerned.

[26] As stated earlier, the aggregate of the fringe benefit amounts to R601,09 and the ratio of fringe benefit output VAT to the total amount of the refund was 0,0006%. This fraction does not satisfy the materiality test that the Legislature included in section 45 of the VAT Act. In the premises the attempt to rely on the fringe benefit errors is a transparent attempt for SARS to *ex post facto* wriggle out of its obligations *vis-à-vis* ABC.

[27] I am satisfied that SARS should be mulcted with costs insofar as the fringe benefit issues is concerned.

[28] In the result the following order is made:

28.1 The VAT returns that the appellant had rendered for the VAT periods, 2015/12, 2016/01, 2016/02 and 2016/03 were not incomplete or defective in any material respect as contemplated in section 45 of the Value-Added Tax Act 89 of 1991.

28.2 The appeal in respect of the VAT periods, 2015/12, 2016/01, 2016/02 and 2016/03 is upheld and the additional assessments for the VAT periods 2015/12, 2016/01, 2016/02 and 2016/03 are altered by reinstating the interest paid by the respondent in accordance with the order of Mokose AJ.

28.3 The respondent is to pay the appellant's costs, including the costs of two counsel, including senior counsel.

28.4 The parties are authorized to approach the court on notice within 15 (fifteen) days of date of this order, with written submissions regarding any consequential orders, if any, required in light of the order.

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L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing:	2 November to 15 November 2019
Date of judgment:	29 April 2020