REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case No A553/16

BMW SOUTH AFRICA (PTY) LTD **Appellant**

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE
Respondent

Judgment

Carelse J:

[1] This is an appeal against the judgment and order of Keightley J in terms of section 138(2) of the Tax Administration Act 28 of 2011 read with rule 49(2) of the Uniform Rules of Court.

Brief Background Facts

[2] The appellant is the BMW group of South Africa, a world- wide organisation who from time to time seconded its expatriate employees from their

home countries to work in South Africa for a short or medium term period.

[3] Material to the secondment and by agreement between the appellant and the expatriate employees is that the appellant will settle the expatriate employees, tax liability during the expatriate employees' secondment to South Africa. The objective was to ensure that the expatriate employees remain tax neutral and are in no worse a position in South Africa. This practice is commonly known as tax equalisation.

[4] The expatriate employee is required to comply with the relevant tax legislation of both the host country and that of South Africa. In terms of the agreement between the expatriate employees and the appellant, the appellant had to instruct a tax consultancy firm in this case KPMG, PWC and Raffray Tax Consultant CC ("the consulting firms") for taxation services. Professional fees rendered by the consulting firm were paid by the appellant for taxation services provided in respect of the expatriate employees of the appellant.

[5] The Commissioner for SARS issued assessments for the expatriate employee's tax for the period 2004-2009 on the basis that the payments to the consulting firms constituted taxable benefits which accrued to the expatriate employees in terms of paragraph (i) of the definition of "gross income" in section 1 of the Income Tax Act 58 of 1962 ("Income tax Act")[1]. read with paragraphs 2(e) and 2(h) of the Seventh Schedule to the Act. The assessments issued against the appellant is for an amount of R2378407.72 for

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[1] Gross income is defined in section 1 of the Income Tax Act 58 of 1962: "gross income" in relation to any year of assessment; means-

(i) In the case of any resident, the total amount, in cash or otherwise, received by or accrued to *or* in favour of such resident; or

(ii) In the case of any person other than a resident, the total amount, in cash or otherwise, received by or accrued to or in favour of such person from source within the Republic'

During such year or period of assessment, excluding receipts or accruals of a capital nature, but including, without in any way limiting the scope of this definition, such amounts(whether of a capital nature or not) so received or accrued as *are* described hereunder, namely-

Paragraph (i) of the definition of gross income provides as follows :

(i) The cash equivalent, as determined under the provisions of the Seventh Schedule, of the value during the year of assessment of any benefit *or* advantage granted in respect of employment or to the holder of any office, being a taxable benefit as defined in the said

alleged taxable benefits.

Findings of the court a quo

[5] The court a quo found that the payments for professional fees fell within the ambit of paragraph (i) of section 1of the Income Tax Act read with para 2(e) of the Seventh Schedule to the Act. The court a quo further found that it was not necessary to address the applicability of paragraph 2(h) of the Seventh Schedule to the Act.[2]

[7] In the view we take of the matter, it is not necessary to deal with paragraph 2(h) of the Seventh Schedule to the Act for the reasons set out herein below but pertinently it is not before us.

The Pertinent issue

[8] What this court is required to determine in this appeal is whether or not SARS was correct in its determination that the professional fees paid by the appellant to the consultancy firms amounted to taxable benefits in terms of paragraph (i) in section 1 of the Income Tax Act read with paragraph 2(e) of the Seventh Schedule and accordingly it was not necessary to deal with the applicability of paragraph 2(h) of the Seventh Schedule.

Schedule, and any amount required to be included in the taxpayer's income under section *BA;*

[2] Paragraph 2 of the Seventh Schedule provides as follows :

"For the purposes of this Schedule and of paragraph (i) of the definition of "gross income" in section 1 of this Act' a taxable benefit shall be deemed to have been granted by an employer to his employee in respect of the employee's employment with the employer, if as a benefit or advantage o f or by virtue of such employment or as a reward for services rendered or to be rendered by the employee to the employer-(e) any service(other than a service to which it the provisions of subparagraph (j) or (k) or paragraph

. 9(4)(a) apply has at the expense of the employer or by some other person), where that service has been utilized by the employee for his or her private or domestic purposes and no consideration has been given by the employee to the employer in respect of that service or, if any consideration has been given, the amount thereof is less than the amount of the lowest fare referred to item (a) of subparagraph (1) of paragraph 10, or the cost referred to in item (b) of that subparagraph, as the case may be; or

[9] Turning to the definition of gross income[3]. The high water mark of the appellant's case is that if no cash equivalent is included in the expatriate employees' remuneration, the expatriate employees do not receive "a benefit *or* advantag " therefore paragraph (i) in section 1 of the Income Tax Act does not apply, so the appellant submits.

[10] During argument counsel for the appellant conceded that if local employees of the BMW group were given the same services as expatriate employees for all intents and purposes such services in respect of local employees would amount to a taxable (fringe benefit). The appellant strongly submits that expatriate employees ate different primarily because of the taxable equalisation policy to the extent that expatriate employees receive the same remuneration as if they were in their home country. The professional services rendered did not place the expatriate employees in an advantageous position. That being so, the payments to the consultancy firms did not affect the expatriate employees remuneration, therefore "no benefit or advantage" as contemplated in paragraph (i) in section 1of the Income Tax Act was received , so the appellant submits.

[11] The test it was conceded was an objective one.[4] Therefore in our view the court *a* quo's, approach cannot be faulted. The complaint of the appellant is that the court a quo incorrectly approached the matter when it compared the position of the local employees to that of the expatriate employees. Pertinently it was submitted that the consultancy firms only rendered professional services to expatriate employees and not to local employees.

[12] The court a quo correctly held that: "In my view, this approach is consistent with the above-cited dicta. As a consequence of the contractual agreement between the appellant and the expatriate employees, the latter became entitled to the services of a tax consultant free of charge. The same benefit was not bestowed on local employees. Whether the tax consultants'

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[3] Para(i) in section 1 of the Income Tax Act

[4] C: SARS V Brummeria Renaissance (Pty)Ltd 2007(6) SA 601 (SCA at 610 0 -H

services actually resulted in a further benefit to the employees concerned, or to the appellant is irrelevant. The service itself, which was provided free of charge to the expatriate employees, was the benefit. It has monetary value, and accordingly falls within the definition of "gross income" for purposes of the first issue in dispute between the parties"[5] We agree that the expatriate employees received a benefit or advantage when the appellant paid the tax consultancy firms for tax services.

[13] This is not the end of the matter. I now turn to deal with the question whether or not the benefit falls squarely within the ambit of paragraph 2 (e) of the Seventh Schedule of the Income Tax Act. If so, the benefit is taxable. Counsel for the appellant submits that paragraph 2(e) *supra* deems a taxable benefit to have been granted to an employee where a service rendered at the expense of employer has been utilised by the employees for his private or domestic purposes. Because the services rendered by the consultancy firms were not used for private or domestic purposes by expatriate employees as contemplated in the sub-paragraph, and accordingly the deeming provisions does not apply, so counsel for the appellant vigorously submits. This submission is supported on the basis that it was common cause that "In order to protect the interests of the appellant and the BMW group, certain payments were made to identified tax consultancy firms for services rendered in respect of the appellant's expatriate employees".[6]

[14] The appellant vigorously contended that the services rendered by the consultancy firms were not used for private or domestic purposes by expatriate employees as contemplated. In a general engagement letter written by KPMG Services (Pty) Ltd, to BMW South Africa setting the services offered *inter alia* herein below:

"Expatriate Tax Consulting Services

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[5] page 144 para 31 vol 3
[6] Volume 3 page 135 paragraph (4.9) judgment

KPMG will also provide South African tax consulting services in respect of any issues arising from the assignment of expatriate employees to South Africa, or in respect of South African residents assigned to foreign locations, as the case may be. We will advise BMW SA regarding the tax implications of any specific matters referred to us from time to time. The scope of assistance in each case will depend on the nature of the assignment. Pre- approval of both scope and fees for this work will be obtained
from BMW SA . . . "[7]

[15] In relation to the phrase ". . . where that service has been utilised by the employee for his or her private or domestic use". Dennis Davis and Others in regard to the aforegoing phrase state the following in Juta's Income Tax

"It is the actual use to which the service was put, not the intention with which it was provided, which is the determining factor here. The determination of this use 1s one of fact. The use must be wholly private or domesitc - if used partially for the business or affairs of the employer, It falls outside this provision."[8]

[16] I understand the appellant's case to be that the services rendered by the consultancy firm were not wholly private. The appellant's reliance on the common cause facts as well as the engagement letter from KPMG to BMW groupis misplaced. There is no evidence that KPMG rendered any services to the BMW group.

[17] For the aforegoing reasons the services rendered by the consultancy firm were rendered wholly for private use. not partially. Reiterating there is no evidence that the tax services that were rendered was partially for BMW group and partially for the expatriate employees. In our view the tax services rendered by the consultancy firm falls squarely within the meaning of paragraph 2(e) of the Seventh Schedule of the Income Tax Act.

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[7] Page 84 of the record
[8] Davis et al Juta's Income Tax, Volume 3 schedule 7 para 2-4

[18] In our view having regard hereto it is not necessary to deal with paragraph 2(h) of the Seventh Schedule of the Income Tax Act. In any event paragraph 2(h) *supra* is not before us on appeal.

[19] In the result, we make the following order:

19.1 The appeal is dismissed with costs, such costs to include the costs consequent upon the employment of two counsel.

Carelse J

Judge of the High Court of South Africa

I agree

Molopa - Sethosa J

Judge of the High Court of South Africa

I agree

Bagwa J

Judge of the High Court of South Africa

Appearances:

Counsel for the Appellant: Mr PJJ Marais SC

Instructed by: Macrobert Inc

Counsel for Respondent: Mr L Sigogo with him

Mr Radichidi Tsele

Instructed by: The Commissioner: SARS