THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 301/2017

In the matter between:

LION MATCH COMPANY (PTY) LTD **APPELLANT**

and

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE **RESPONDENT**

Neutral citation: *Lion Match Company (Pty) Ltd v Commissioner for the South African Revenue Service* (301/2017) [2018] ZASCA 36 (27 March 2018)

Bench: Ponnan, Mbha, Dambuza and Mathopo JJA and Davis AJA

Heard: 13 March 2018

Delivered: 27 March 2018

Summary: Income tax – Tax Administration Act 28 of 2011 – dismissal of an application by taxpayer to set aside rule 31 statement – not appealable.

ORDER

On appeal from: Tax Court of South Africa, held in Durban (Moodley J)

The appeal is struck from the roll with costs, such costs to include those of two counsel.

JUDGMENT

Ponnan JA (Mbha, Dambuza and Mathopo JJA and Davis AJA concurring):

[1] Internationally, Capital Gains Tax (CGT) is not uncommon. And, though implemented by several of our trading partners many decades ago, it was only introduced in South Africa with effect from 1 October 2001.[1] CGT is loosely defined as a tax payable on a capital gain and is triggered by the disposal of an asset on or after that date. The CGT provisions are contained in the Eighth Schedule to the Income Tax Act 58 of 1962 (ITA). Section 26A of the ITA serves as a link between the main body of the Act and the Eighth Schedule.[2] The Eighth Schedule determines the taxable capital gain or assessed capital loss and s 26A provides that the taxable capital gain must be included in the taxable income of a taxpayer for the year of assessment. According to para 3 of the Eight Schedule to the ITA, a taxpayer's capital gain for a year of assessment in respect of the disposal of an asset is equal to the amount by which the proceeds received or accrued in respect of that disposal exceeds the base cost of the asset.

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[1] In the 2000 Budget, the Minister of Finance announced the introduction of a capital gains tax with effect from 1 April 2001. That implementation date was subsequently deferred until 1 October 2001.
See: *http://www.treasury.gov.za/documents/national%20budget/2000/speech/speech.pdf* at 18 and *http://www.treasury.gov.za/documents/national%20budget/2001/speech/speech.pdf* at 14.

[2] Section 26A and the Eight Schedule to the Act were introduced by the Taxation Laws Amendment Act 5 of 2001.

[2] During the 2008 year of assessment the appellant, Lion Match Company (Pty) Ltd (the taxpayer), disposed of its entire shareholding in the Kimberly Clark Group. The market value ascribed by the taxpayer to the shares as at 1 October 2001[3] was adopted as the base cost in determining its taxable capital gain. However, in assessing the taxpayer to tax by way of an additional assessment on 30 April 2013, the respondent, the Commissioner for the South African Revenue Service (SARS), adjusted the base cost of the value of the shares, which resulted in an increase in the taxpayer's taxable capital gain.

[3] On 12 July 2013 the taxpayer objected to the adjustment, which was disallowed by SARS. The taxpayer then noted an appeal against the disallowance of its objection to the Tax Court, Durban. On 14 August 2015 SARS delivered its statement of grounds of assessment and opposition to the taxpayer's appeal in terms of Rule 31 of the Rules promulgated under section 103 of the Tax Administration Act 28 of 2011 (the TAA). Rather than avail itself of the opportunity to respond with a statement of its own in terms of Rule 32,[4] the taxpayer launched an application styled 'Appellant's notice of application in terms of Tax Court Rule 31(3) issued in terms of the provisions of the Tax Administration Act 28 of 2011'. Asserting that SARS had included in its statement 'a ground that constitutes a novation of the whole of the factual or the legal basis of the disputed assessment issued on 30 April 2013',[5] the taxpayer sought an order in the following terms from the Tax Court:

'1. declaration that the respondent has failed to comply with the provisions of Tax Court Rule 31(3) in that the statement of grounds of assessment include a ground or grounds that:

1.1 constitute a novation of the whole of the factual and/or legal basis of the assessment dated 31 March 2013; and/or

1.2 require the issue of a revised assessment;

2. setting aside the statement of grounds of assessment dated 14 August 2015 as invalid for want of compliance with the provisions of Tax Court Rule 31(3);

[3] 1 October 2001 is the valuation date as defined in s 1 of the Eight Schedule to the ITA.
[4] Rule 32(1)*(b)* provides: 'the appellant must deliver to SARS a statement of grounds of appeal within 45 days after delivery of the statement by SARS under Rule 31'.
[5] In that regard reliance was placed on Rule 31(3), which reads: 'SARS may not include in the statement a ground that constitutes a novation of the whole of the factual or legal basis of the disputed assessment or which requires the issue of a revised assessment.'

3. costs of suit'

The Tax Court (per Moodley J) dismissed the application, but granted leave to the taxpayer to appeal to this court.

[5] SARS contends that the appeal should be dismissed on the ground that the order of the Tax Court is not appealable. In embarking upon that enquiry, the question is not whether the decision of the Tax Court, if wrong, can be corrected on appeal. The real question is whether the decision can be corrected 'forthwith and independently of the outcome of the main proceedings' or whether the taxpayer is constrained to await the outcome of the main proceedings before this decision of the Tax Court can be attacked as one of the grounds of appeal.[6] In effect, the question is whether the particular decision may be placed before a court of appeal in isolation, and before the proceedings have run their full course.[7]

[6] The Tax Court is constituted in terms of the TAA.[8] As such, the scope of its jurisdiction, its powers and the ambit of any right of appeal from its decisions are defined in the TAA.[9] According to s 117, the Tax Court has jurisdiction over appeals lodged under s 107. In terms of s 107(1) 'a taxpayer objecting to an assessment or "decision" may appeal against the assessment or "decision" to the Tax Court'. 'Decision' is defined in s 101 as 'a decision referred to in s 104(2)'. Three decisions are referred to in s 104(2), namely - (a) a decision not to extend the period for lodging an objection; (b) a decision not to extend the period for lodging an appeal and (c) any other decision that may be objected to or appealed against under a tax Act.

[7] Section 133(1) of the TAA provides for an appeal against a decision of the tax court under ss 129 and 130. Section 130 deals with orders for costs and is not presently relevant. Section 129 provides:

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[6] *Beinash v* Wixley [1997] 2 All SA 241 (A) at 247.
[7] *Liberty Life Association of Afrcia Ltd v Niselow* (1996) 17 ILJ 673 (LAC) at 676.
[8] Section116.
[9] *Wingate-Pearse v Commissioner for South African Revenue Service* 2017 (1) SA 542 (SCA) para 6.

'(1) The tax court, after hearing the "appellant's" appeal lodged under s 107 against an assessment or "decision", must decide the matter on the basis that the burden of proof as described in s 102 is upon the taxpayer.
(2) In the case of an assessment or "decision" under appeal or an application in a procedural matter referred to in section 117(3), the tax court may –
(a) confirm the assessment or "decision";
(b) order the assessment or "decision" to be altered; or
(c) refer the assessment back to SARS for further examination and assessment'.

[8] In determining whether the decision of the Tax Court is appealable under s 129, the question is whether the decision is one contemplated by s 104(2) of the TAA. In this case it plainly is not. That ought to be the end of the enquiry. However, counsel for the taxpayer submitted that the application which served before the Tax Court had to be likened to an exception rather than an application to strike out in terms of Rule 6(15) of the Uniform Rules of Court.[10] It is trite that a dismissal of an exception (save an exception to the jurisdiction of the court), presented and argued as nothing other than an exception, is not appealable.[11] Accordingly, so the submission went, the Tax Court in dismissing the application had spoken the final word on the issue of its jurisdiction[12] and the order was for that reason appealable.

[9] Jurisdictional challenges should be raised either by exception or special plea depending on the grounds upon which the challenge arises.[13] In either event the issue must necessarily be disposed of first because upon it depends the power of the court to

[10] Rule 6(15) of the Uniform Rules provides that:
'The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.' See *Maharaj & others v Mandag Centre of Investigative Journalism NPC & others* 2018 (1) SA 471 (SCA) paras 14-20.
[11] *Maize Board v Tiger Oats Ltd and others* 2002 (5) SA 365 (SCA) para 14.
[12] In *Steytler NO v Fitzgerald* 1911 AD 295 at 305, De Villiers CJ observed:
'Whichever way the decision was given it spoke the final word upon the issue of jurisdiction. If the Court had decided that it had no jurisdiction the plaintiff's suit as against the executor would have come to an end. The Court, however, decided that it had jurisdiction, with the result that whatever the final decision might be, the executor was made amenable against his will to a jurisdiction other than that of his own-dwelling-place. Such an order, in my opinion, has also the effect of a definitive sentence.'
[13] *Makhanya v University of Zululand* 2010 (1) SA 62 (SCA) para 29.

make any further order.[14] Here, the want of jurisdiction on the part of the Tax Court was not raised by way of exception or special plea. And, not having been raised in that manner, it was neither presented nor argued as an exception to jurisdiction. Instead, it was only tangentially raised as part of what counsel for the taxpayer conceded was a rather novel application to the Tax Court. What is more, not having been squarely raised, the Tax Court did not as such pronounce on the issue. It must follow that, absent a decision by the Tax Court on the question of jurisdiction, an appeal can hardly avail the taxpayer. For, an appeal lies not against the reasoning, but the substantive order of a court.[15] Thus even on the basis postulated by counsel for the taxpayer an appeal is not competent.

[10] It follows that the decision of the Tax Court is not appealable and in the result the appeal falls to be struck from the roll with costs, such costs to include those of two counsel.

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V M Ponnan

Judge of Appeal

[14] Ibid.

[15] *Western Johannesburg Rent Board & another v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 355.

APPEARANCES:

For Appellant:	A R Bhana SC (with him C J Dreyer) Instructed by: Garlicke & Bousfield Inc., Umhlanga Rocks Claude Reid Attorneys, Bloemfontein
For Respondent:	K W Lüderitz SC (with him F Southwood) Instructed by: The State Attorney, Pretoria The State Attorney, Bloemfontein