IN THE TAX COURT **REPORTABLE**

HELD AT DURBAN

CASE NO: 11449

In the matter between:

First Appellant

Second Appellant

Third Appellant

and

THE COMMISSIONER FOR THE
SOUTH AFRICAN REVENUE SERVICE Respondent

JUDGMENT

Date heard: 24 November 2005

Date delivered: 16 March 2006

THERON J

Introduction

This is an appeal in respect of an assessment for stamp duty raised in respect of two separate transfers of shares involving the appellants.

Background

As at 27 July 2001, the first appellant was a wholly owned subsidiary of an off-shore parent company, A Netherlands, ("A"), a Dutch registered company. On 27 July 2001, A transferred its shares in the first appellant to A PLC (the first transfer). A PLC then changed its name to A

HOLDINGS PLC (the second appellant). Another company within this group of companies changed its name to A PLC (the third appellant) and became the holding company of A HOLDINGS PLC.

On 1 August 2001, A HOLDINGS PLC transferred its shares in the first appellant to A PLC (the second transfer). On 2 August 2001, A PLC transferred its shares in the appellant to B PLC (the third transfer). All of these transfers were part of an international group reorganisation.

On 22 January 2002, the first appellant registered the transfer of its shares to the second appellant and the subsequent transfer to the third appellant in its share register. On 23 January 2002, the appellants applied to the respondent for a ruling to the effect that the transfers were part of a rationalisation scheme as defined, and as such each transfer was exempt from the payment of stamp duty. The respondent issued a ruling to the effect that the transfers did not constitute a rationalisation scheme as defined. On 30 January 2002, the appellants paid stamp duty in respect of the third transfer.

On 1 April 2004, the respondent issued a stamp duty assessment in respect of the three transfers of shares, calculating duty at a rate of 0.75% of the value of each transfer in terms of item 15(3) (h) (ii) of Schedule 1 to the Stamp Duties Act, No 77 of 1968, on the basis that the transfers had not been registered within six months from date of execution. In addition, the respondent imposed a validating penalty on each transfer for the late stamping of the instrument of transfer.

The appellants objected to the assessment, as well as to the imposition of validating penalties. On review of the objection, the respondent issued a revised assessment on 27 May 2004, effectively

imposing duty at a rate of 0.25% on the third transfer and retaining the duty at a rate of 0.75% on the first two transfers. No validating penalties were imposed.

The appellants subsequently submitted revised grounds of appeal, limiting the dispute to the rate at which duty was calculated on the first and second transfers. The appellants conceded that all three transfers were subject to the imposition of stamp duty, but at a rate of 0.25%. At the hearing of this matter it was common cause that the appellants have paid stamp duty, at a rate of 0.25%, in respect of all three transactions.

Issue

The only issue to be determined is the appropriate rate of stamp duty payable in respect of the two transactions, namely:-

(i) the transfer by A Netherlands of its entire shareholding in X (SOUTH AFRICA) (PTY) LIMITED (the first appellant) to A HOLDINGS PLC; and

(ii) the subsequent transfer of the entire issued share capital in the first appellant from A HOLDINGS PLC to A PLC.

Discussion

At the relevant time the stamp duty payable in respect of these transactions fell to be determined in terms of item 15(3) (h) of Schedule 1 to the Stamp Duties Act, which read as follows:

> "In respect of the registration of transfer of any such marketable security:-
> (a)-(g) …
> (h) if the marketable security was sold or disposed of (whether conditionally or not) after 31 March 1997 and the date of sale or disposal is noted on the

relevant instrument of transfer referred to in section 23 of this Act by the transferee or his agent and such note is signed by the transferee or his agent:-

(i) if transfer:-

(aa) other than a transfer contemplated in sub-paragraph (bb) is registered before the expiry of a period of six months; or

(bb)…

from the date of execution of the relevant instrument of transfer referred to in section 23 of this Act : for every R10, or part thereof, of the amount or value of the consideration …

(ii) if transfer:-

(aa) is registered after the expiry of the period of six months referred to in sub-paragraph (i)(aa); or

(bb) three times the duty which would have been payable under (h)(i) if transfer had been registered before the expiry of the said period of six months or three months, as the case may be."

The dispute between the appellants and the respondent is whether the rate of 0.25% is the appropriate rate of duty or whether the rate of duty is three times that amount namely 0.75%. The difference between these two amounts is substantial, amounting to R4 445 000,00 on each transaction.

It is the appellants' contention that all the requirements necessary to effect the registration of the transfers in accordance with the law were effected within the period of six months which attracts the lower rate of duty. It is the respondent's contention that the steps taken by the appellant were legally ineffective by virtue by the then provisions of section 23(4) of the Stamp Duties Act, which read at the relevant time:

"No transfer of any marketable security shall be made or permitted by any company or corporate body in its register (whether the register be kept within or outside the Republic) or by any person responsible for the registration of transfer, unless:

(a) there is lodged with such company, body or person an instrument of transfer relating to the transfer of such marketable security; and

(b) (i) where duty is payable under Item 15(3) of Schedule 1 in respect of the registration of such transfer, such instrument is duly stamped;"

The contention by the respondent is that the effect of section 23(4) is to invalidate the steps taken to register the transfer of the shares in the members' register of the first appellant . Accordingly it is contended that the registration that took place falls to be disregarded and on that basis the higher rate of duty is payable.

I agree with the submission advanced by Mr Wallis, who appeared on behalf of the appellants, that there is nothing in the provisions of the Stamp Duties Act that serves to bring about this result. Section 23(9), which has now been deleted from the Act, dealt expressly with the consequences of non-compliance with the provisions of section 23(4) and provided that:

> "If any company or corporate body or any officer thereof fails to comply with any requirement of sub-section (4) …, it shall, in addition to being liable for any unpaid duty, incur a penalty not exceeding R4000,00."

The only form which non-compliance with any requirement of section 23(4) could take would be a registration of transfer without the payment of the requisite duty or without compliance of the formal requirements evidencing such payment or the entitlement to exemption. The consequences of such failure are set out in section 23(9) being that:

(i) the company, corporate body or officer concerned is liable for any unpaid duty; and

(ii) a penalty not exceeding R4000.00 is payable.

The language of the statute expressly provides for the consequences of a breach and they are that the unpaid duty is payable plus a penalty. The "unpaid duty" can only be a reference to the duty that should have been paid at the time the transaction occurred. In this case, as the transaction occurred within the period of six months, such duty is to be calculated at the rate of 0.25% and not at the rate of 0.75% as claimed by the respondent.

There is ample authority in our case law for the proposition that the consequences of a breach of a statutory prohibition ought to be determined upon a proper construction of the statute and invalidity is only to be imputed to the transaction where that is the intention to be imputed to the legislature.[1]

In *Geue and Another v Van der Lith and Another,*[2] Brandt JA summarised the law in the following terms:

> "It is a settled principle of our law that a contract which contravenes a statutory provision is not *ipso iure* void, unless, of course, the statute contains an express statement to that effect. In every case the question whether the contract is void or not depends on whether such an intention is to be imputed to the Legislature."

This statement by Brandt JA harks back to the original judgment on this topic where Solomon JA in *Standard Bank v Estate Van Rhyn*[3] said:

> "As *Voet* (1.3.16) puts it – 'but that which is done contrary to law is not *ipso jure* null and void, where the law is content with a penalty laid down against those who contravene it.' Then, after giving some instances in illustration of this principle, he proceeds: 'The reason of all this I take to be that in these and the like cases greater inconveniences and impropriety would result from the rescission of what was done, than would follow the act itself done contrary to the law.' "

In the case of *McLoughlin NO v Turner,*[4] Innes CJ said:

> "This is a revenue statute and it is a well recognised rule of construction that the mere imposition of a penalty for the purpose of protecting the revenue does not invalidate the relative transaction."

These words of Innes CJ are particularly apposite in the present context. Whilst the rule is not an absolute rule, as Innes CJ went on to point out, it is nonetheless strongly indicative of legislative intention. Where there is no other public interest being protected by the prohibition – and none is suggested in this case – then a construction against invalidity is appropriate.

Applying these principles, the question then is whether the legislature intended the provisions of section 23(4) of the Stamp Duties Act to invalidate the registration of transfer of a marketable security because the appropriate stamp duty on that transaction had not been paid or the requisite proof of such payment had not been produced. It is clear from a reading of section 23(4) (a) that its purpose is to facilitate the collection of stamp duties and to provide incentives for people to pay those duties before registering the transfer of a marketable security. Whilst this purpose may be important there are other no less important purposes to be served by the registration of transfer. Primary amongst these is that the members' register of a company should properly reflect the identity of the members of that company. The members' register of a company is *prima facie* evidence of who is a member of the company and who may exercise the rights and be subject to the obligations of a member. That is at least as important a matter as the payment of transfer duty, a liability which is in no way dependent upon the registration of the transfer of the marketable security or compliance with the other formalities laid down in section 23(4) of the Stamp Duties Act.

As pointed out above the legislature has expressly set out the consequences of non-compliance with section 23(4) in section 23(9) and those consequences do not include the invalidity of the transfer. Instead the legislature confines itself to a penalty (R4000.00) which hardly indicates an intention to impose a far graver penalty of nullity of the transaction. In my view the purpose of providing

different rates of duty where the transfer of marketable securities is delayed beyond the initial period of six months is to encourage parties to register such transfer within that period of time.

In the circumstances, I make the following order:

(i) The appeal is upheld.

(ii) The assessment appealed against is set aside and substituted with an assessment for the payment of stamp duty in the amount of R2 222 500.00 in respect of each transfer.

Appellants' counsel: M J D Wallis SC
Appellants' attorneys: Shepstone & Wylie

Respondent's counsel: D Lalor