IN THE TAX COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: **IT14036**

In the matter between:

ABC CC	Appellant
v	
THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Respondent

Coram: ***Dlodlo J***

Date of Hearing: 19 June 2017

Date of Judgment: 14 August 2017

JUDGMENT

DLODLO, J:

INTRODUCTION

[1] In terms of Rule 34 of the Tax Court Rules promulgated under section 103 of the Tax Administration Act 28 of 2011, as amended, ('the TAA'):

> The issues in an appeal to the tax court will be those contained in the statement of the grounds of assessment and opposing the appeal read with the statement of the grounds of appeal and, if any, the reply to the grounds of appeal.

Therefore, the issues before me are those contained in the respondent's Rule 31 statement of the grounds of assessment and opposing the appeal (Dossier page 17-27) read with the appellant's Rule 32 statement of the grounds of appeal (Dossier page 28-38). These documents set out both the material facts and the legal grounds on which the parties place reliance.

[2] This, I am told, is particularly significant in the present matter because the respondent ('SARS') reportedly, changed its stance in its Rule 31 statement of the grounds of assessment and opposing the appeal. It is the correctness of this pleaded stance that calls for adjudication by this Court along with that of the appellant ('the taxpayer').

THE ISSUE FOR DETERMINATION

[3] The sole issue in this appeal is whether SARS was precluded from raising an original assessment ('the STC assessment') on the taxpayer for Secondary Tax on Companies ('STC') when it purported to do so. The purported STC assessment is contained in the Dossier before court. It bears the date 11 March

2015. It indicates a ‘Dividend declared date’ of 28 February 2011 and a ‘Dividend Cycle’ from 1 March 1997 to 28 February 2011.

[4] It is correctly deemed unnecessary to deal with the merits of this matter in view of the sole issue between the parties which is whether SARS was precluded by prescription of the time period within which it could validly issue an STC assessment from issuing the purported STC assessment on 11 March 2015. However, it is common cause that SARS raised the STC assessment on the basis of a ‘deemed dividend’, deemed to have been declared on 28 February 2011 in respect of a ‘dividend cycle’ ending on 28 February 2011. The latter date was the last day of the taxpayer’s income tax year of assessment which ended on 28 February 2011.

[5] There is a fundamental difference between the parties as to which statute(s) govern(s) the question of prescription in the circumstances of this matter. The taxpayer relies on section 269 (5) of the TAA read with the further proviso to section 79 (11) of the Income Tax Act 58 of 1962, as amended (‘the Act’). The latter Act applied prior to its repeal by the TAA with effect from 1 October 2012. SARS relies exclusively on the provisions of the TAA.

[6] It is significant to mention that the TAA came into force on 1 October 2012, i.e. after 28 February 2011 and after 19 December 2011, but prior to the raising of the purported STC assessment on 11 March 2015. On 1 April 2012, the STC which was governed by sections 64B and 64C in Part VII of Chapter 2 of the Act was replaced by the dividends tax. The latter tax is governed by sections 64D to 64N in Part VIII of Chapter 2 of the Act (which were enacted with effect from 1 April 2012).

[7] It is therefore clear that by the time that the TAA came into force on 1 October 2012, STC had already been replaced by the dividends tax. One must accept that this explains why section 99 of the TAA does not deal specifically with STC whereas the further proviso to section 79(1) of the Act did. It explains further why taxpayers' rights and entitlements in relation to STC assessments are preserved in terms of section 269(5) of the TAA.

[8] The TAA contains 'transitional provisions' in Sections 258 to 270 thereof. Section 269(5) of the TAA (one of the transitional provisions), provides that:

> A right or entitlement enjoyed by, or obligation imposed on, a person under the repealed or amended provisions of a tax Act, that had not been exercised or complied with before the commencement date of this Act, is a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.

[9] Of course one of the provisions that was repealed by the TAA was section 79(1) of the Act, including the provisos thereto. Prior to its repeal, and in particular on 28 February 2011 (the date on which SARS maintains that dividends were deemed to have been declared by the taxpayer for STC purposes), and on 19 December 2011, the date of the assessment for normal tax raised by SARS on the taxpayer in respect of its year of assessment ended 28 February 2011 (as evident in Trial Bundle page 1), the further proviso to section 79(1) of the Act read as follows:

> Provided further that where the Commissioner has in respect of any year of assessment made an assessment upon any company for normal tax purposes, he or she shall not after the expiration of three years from the date of the said assessment (or, where more than one such assessment has been made, from the date of the latest of such assessments), or such longer period as the

> company and the Commissioner may agree prior to the expiry of that three year period, make any assessment in respect of any amount of secondary tax on companies payable by the company in respect of any dividend declared during that year, unless the Commissioner is satisfied that the fact that an assessment in respect of the said amount was not previously made was due to fraud or misrepresentation or non-disclosure of material facts.

[10] Mr X submitted that the words 'any dividend declared during that year' in the further proviso to section 79(1) *supra* include *'an amount deemed to be a dividend declared by a company to a shareholder'* as contemplated in section 64C(2), the provision relied on by SARS when purporting to raise the STC assessment. This submission must be correct. SARS made an assessment upon the taxpayer for normal tax purposes, in respect of its year of assessment which ended 28 February 2011, on 19 December 2011. This is evident in the Trial Bundle.

[11] It must follow that on 19 December 2011, prior to the coming into force of the TAA and prior to the repeal of section 79(1) of the Act, the taxpayer acquired a right or entitlement, as contemplated in section 269(5) of the TAA, that SARS would not be able to – in the words of the further proviso to section 79(1) 'make any assessment in respect of any amount of secondary tax on companies payable by the company in respect of any dividend declared during that year' after the expiration of three years from 19 December 2011.

[12] Indeed given the existence of this right or entitlement under the further proviso to the repealed section 79(1) of the Act (as contemplated in section 269(5) of the TAA), it was 'a valid right or entitlement in terms of' section 99 of the TAA. The latter section is the 'comparable provision' of the TAA and this was the case as from the date that the right or entitlement first arose in terms of

section 269(5) of the TAA. In other words, the content of the further proviso to the repealed section 79(1) must be 'read into' section 99 of the TAA in the circumstances of this matter.

[13] It is of importance to mention that section 99 of the TAA governs the 'period of limitations for issuance of assessments'. It must thus follow that, by virtue of section 269(5) of the TAA, the taxpayer was, and is, entitled to rely on the content of the further proviso to section 79(1) of the Act which expressly deals with STC.

[14] One must therefore understand that this is why the taxpayer's case is that SARS could not issue an STC assessment in respect of a dividend (deemed to be) declared during its 2011 year of assessment after the expiration of three years from 19 December 2011. The latter date is a date of its normal tax assessment for the year of assessment which ended on 28 February 2011. Regard being had to the above, it must have come as no surprise that one Mr Y on behalf of SARS stated in an email dated 11 November 2014 sent to the taxpayer's accountant, that:

> The date used was the assessment date for the 2011 return, namely, 19/12/2011. This return will thus prescribe on 19/12/2014.

It also came as no surprise to the taxpayer that on 18 December 2015 Tax Court Specialist, one Mr Z also on behalf of SARS said the following in a letter to the taxpayer:

> It is common cause between the parties that the period within which the Commissioner 'had' to issue an assessment in respect of the dividend cycle in dispute expired on 19 December 2014.

[15] According to Mr X these two SARS officials were correct in what they stated in the correspondence quoted above. Strangely, the stance adopted by these SARS officials was departed from three days later in a letter dated 21 December 2015. It was also departed from in SARS's Rule 31 statement of the grounds of assessment and opposing the appeal.

[16] In view of the fact that the 'prescription period' or, in the words of section 99 of the TAA, the 'period of limitations for the issuance of assessments', commenced from the date of the taxpayer's 2011 normal tax (i.e. income tax) assessment it becomes important to appreciate what an assessment is. Perhaps one must first recognise the appropriateness of what was held by the Supreme Court of Appeal in ***Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd*** 2007 (6) SA 601 (SCA) at para [26], which is as follows:

> It seems to me that these competing contentions must be resolved by having regard to the purpose underlying sections 79(1) and 81(5), which is obviously to achieve finality. To uphold either of the Commissioner's contentions would undermine that purpose. It is obviously in the public interest that the Commissioner should collect tax that is payable by a taxpayer. But it is also in the public interest that disputes should come to an end – interest *reipublicae ut sit finis litium;* and it would be unfair to an honest taxpayer if the Commissioner were to be allowed to continue to change the basis upon which the taxpayer were assessed until the Commissioner got it right – memories fade; witnesses become unavailable; documents are lost. That is why section 79(1) seeks to achieve a balance: it allows the Commissioner three years to collect the tax, which the Legislature regarded as a fair period of time; but it does not protect a taxpayer guilty of fraud, misrepresentation or non-disclosure. If either of the

> Commissioner's arguments were to be upheld, this balance would be unfairly tilted against the honest taxpayer.

[17] Notably, there has been no suggestion of any fraud, misrepresentation or non-disclosure in the present matter; and SARS purported to raise the STC assessment on 11 March 2015, i.e. after the expiration of the three-year period from 19 December 2011, the date of the taxpayer's 2011 assessment for normal tax. The problem is SARS only changed the basis on which it purportedly assessed the taxpayer on 11 March 2015 in its letter dated 21 December 2015, which can be contrasted with the basis stated in its letter dated three days earlier, on 18 December 2015.

[18] Perhaps it is time for me to return to what exactly is an assessment. It is trite that an assessment is not the piece of paper that notifies a taxpayer of a tax determination. The latter is a 'notice of assessment'. An 'assessment' is the determination (or decision) itself, notified in a notice of assessment. In ***First South African Holdings (Pty) Ltd v Commissioner, South African Revenue Service*** 73 SATC 221 (SCA) at paras [15] to [18], a matter in which it was common cause that the taxpayer (which sought a reduced assessment) had previously overstated its income, the Supreme Court of Appeal held as follows:

> [15] The second issue, as mentioned, is whether the taxpayer was time barred by section 79A(2)(*a*). This depends on the question whether the three year 'prescription' period began to run once the original assessment was issued or on the date of the additional assessment. The date of the 'error' is irrelevant. If 'assessment' in section 79A were to be a reference to the notice of assessment, the latter date would presumably be the appliable one. But that is not what an assessment is. It is a 'determination' by the Commissioner of one or more matters (compare ITC 1077 28 SATC 33 at 38 per Corbett J). This appears from the definition of the word in section 1 of the Income Tax Act:

' "assessment" means the determination by the Commissioner, by way of a notice of assessment …'

[16] The 2006 assessment was a re-assessment of a loss ranking for set-off under paragraph (*c*). It did not re-assess the income of R15 892 978 under paragraph (*a*). What the taxpayer sought is an indulgence relating to the latter and not the former – it had overstated its income. It wanted the Commissioner to re-consider the quantum of its taxable income but, using the wording of the section, 'that assessment' was made during 2003 and became final during 2006. The section does not allow the Commissioner to revisit 'any' assessment.

[17] …

[18] This result might at first blush appear to be unfair towards the taxpayer in the circumstances of this case. But any other conclusion about the meaning of 'assessment' would have meant that the Commissioner could within three years as from 2006 have reconsidered the taxpayer's taxable income of R15 892 978 by means of a new assessment under section 79(1), thereby raising the taxable amount six years after his original assessment of that amount. That is unthinkable (*Commissioner, South African Revenue Service v Brummeria Renaissance (Pty) Ltd* 2007 (6) SA 601 (SCA) para [26]).'

It is noteworthy that the word *'assessment'* is defined in section 1 of the TAA as a *'determination'*. I see no reason why this Court cannot take judicial cognisance of the fact that the date of the purported STC assessment was 11 March 2015 and that this was more than three years after the date of the taxpayer's 2011 assessment for normal tax, i.e. 19 December 2011. The latter date (if not the significance thereof) is common cause between the parties.

[19] In **ITC 1470 52 SATC 88** at 93-94 Leveson J held as follows:

Faced with this difficulty, counsel for the respondent sought refuge in the argument that the onus of establishing that the additional assessment was

raised more than three years after the original assessment rests on the taxpayer and contended that, by closing his case without calling evidence, the appellant had not established that the dates of the relevant assessments were more than three years apart. According to him the dossier itself does not constitute evidence unless the parties agree thereto. They had not so agreed in the present case. His conclusion was that, because there was no evidence, that the additional assessments had been raised more than three years after the original assessments, section 79 had no application and the need for the Commissioner to discharge the onus suggested to be on him in the Natal Estates and Trow cases did not arise.

This submission, which first came to our attention when supplementary heads of argument were handed in by counsel for the respondent after the hearing was concluded, came as a surprise to us. In the first place, the entire argument before us was based on the contents of the dossier and proceeded on the basis that the parties accepted its correctness. The dates of the various assessments in question appear fully from the contents of the dossier. In the second place, Regulation B8.1 enjoins that the dossier is to be before the Court at the hearing of the appeal.

One must question the purpose of this requirement if the Court is not to take notice of its contents. In my opinion the submission is without substance.

…

As to the question as to whether there was evidence before us of the period that had elapsed, as already stated by me, the dossier containing the dates upon which the relevant assessments were issued was before us and it was a simple matter to establish therefrom when the relevant periods commenced and terminated. This submission can, therefore, be dismissed on the same basis as the previous one.

We bear in mind that Rule 40(1) of the Tax Court Rules now requires SARS to deliver a dossier to the Registrar of the Tax Court at least 30 days before the hearing of a tax appeal. But Rule 40(3) now requires the Registrar to deliver the dossier to the Tax Court at least 20 days before the hearing of the appeal. Rule 40(1) stipulates the documents that must be contained in the dossier, and Rule 40(1)(*b*) requires *'all assessments by SARS relevant to the issues in appeal'.*

[20] A mention must be made that the taxpayer's original normal tax assessment for the year of assessment which ended on 28 February 2011 dated 19 December 2011, was clearly *'relevant to the issues in appeal'* when regard is had to the contents of the taxpayer's Rule 32 statement but this was not included in the dossier by SARS. The taxpayer has had this included in the Trial Bundle. The submission made by Mr X in this regard is that such assessment should be treated as it would have been treated if it had been in the dossier precisely because it was required to have been included in the dossier. I find no difficulty in accepting this submission as correct. Of course the Court can and must take notice of the contents of the dossier including the 2011 normal tax assessment dated 19 December 2011 on the basis of what was said by Leveson J in **ITC 1470** *supra*.

[21] In the alternative regard being had to what Mr. Y and Mr. Z conveyed to the taxpayer on behalf of SARS in the correspondence quoted earlier in this judgment a legitimate expectation on the part of the taxpayer developed that the period of limitations for the issuance of an STC assessment in respect of the taxpayer's dividend cycle ending 28 February 2011, ended on 19 December 2014. The taxpayer must have had a legitimate expectation that an STC assessment would not and could not be issued after 19 December

2014. Ordinarily, there can be no legitimate expectation that is contrary to the provisions of the applicable legislation. What needs to be pointed out though in this matter is that the content of the legitimate expectation was fully in conformity with Sections 99 and 269(5) of the TAA read with the repealed further proviso to section 79(1) of the Act.

[22] In summary, in terms of section 79 (1) of the Act prior to its repeal by the TAA, the taxpayer had the right and an entitlement not to be subjected to an STC assessment in respect of a dividend cycle ending on 28 February 2011 after 19 December 2014. The STC assessment was in fact issued on 11 March 2015, by which time the period of limitations for the issuance of the STC assessment had expired. Therefore it must follow that the STC assessment was not validly issued by SARS. The period within which SARS could validly have done this had 'prescribed' on 19 December 2014.

[23] SARS placed reliance on Tax Case 13492 where Jansen J stated the following:

> The taxpayer was assessed in terms of the provisions of section 64C(2)(*g*) on the loans made available to the connected persons related to the appellant. In consequence, in terms of section 64C(6), as the Commissioner had deemed this amount to be a dividend, it triggered the necessity to file the STC return and pay the STC within a month after the end of the dividend cycle.

The difficulty is that facts in the above matter are distinguishable from facts in the present matter. Another facet is that neither section 269(5) of the TAA nor the further proviso to section 79 (1) of the Act was raised or considered in case number 13492. It shall be borne in mind that Tax Court judgments bind the parties to the particular dispute but do not create binding legal precedent. Of course they do have persuasive value. Maybe by way of warning it is prudent to mention that SARS is precluded from relying for the first time in argument on

a material fact when the existence of such a later assessment was not pleaded as material fact by either of the parties. The Supreme Court of Appeal in ***First South African Holdings (Pty) Ltd v Commissioner, South African Revenue Service*** 73 SATC 221 *supra* also made the position clear.

[24] On the question of costs I bear in mind the provisions of section 130(1)(*a*) of the TAA provides that:

> The tax court may, in dealing with an appeal under this Chapter and on application by an aggrieved party, grant an order for costs in favour of the party, if—
>
> (*a*) the SARS grounds of assessment or 'decision' are held to be unreasonable; …

It is contended on behalf of the taxpayer that the latter is so aggrieved such that it requests the Court to make an award of costs in its favour on the ground that the SARS grounds of assessment were unreasonable. I have in the body of the judgment demonstrated failures and omissions on the part of SARS and it is unnecessary to repeat same.

ORDER

[25] In the circumstances, I make the following order:

(a) The appeal is allowed;

(b) It is directed that the purported STC assessment is hereby set aside;

(c) Costs are awarded in favour of the taxpayer in terms of section 130(1)(*a*) of the Tax Administration Act 28 of 2011 as amended.

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DV DLODLO

Judge of the High Court