IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

15/12/16

Case Number: A174/15
Tax court case no: VAT1005

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / NO.

(2) OF INTEREST TO OTHER JUDGES: YES / NO.

(3) REVISED.

DATE SIGNATURE

In the matter between:

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	APPELLANT
and	
AMEWELE JOINT VENTURE CC	RESPONDENT

Coram: HUGHES J

JUDGMENT

HUGHES J

[1] This is an appeal against the judgment of Mali J in the Tax Court in terms of section 133 (2) (a) of the Tax Administration Act 28 of 2011. The dispute focuses on the interpretation of section 11 (2) read with section 8 (23) of the Value Added Tax

Act 89 of 1991 (the Vat Act) and section 3 (5) of the Housing Act 107 of 1997 (the Housing Act). The respondent cross appeals the said judgment in so far as it orders the amount to be refunded be payable with interest from the date of the order. Instead, the order sought by the respondent is that the refund amount payable should attract interest from the date when the refund was due.

[2] The respondent seeks condonation for the late filing of its heads of argument which were due on 17 August 2016 but only filed on 19 August 2016, two days after the due date. This matter was due to be heard on 31 August 2016. The appellant has not opposed the condonation sought by the respondent. The grounds advanced by the respondent leans towards experiencing some difficulties in obtaining instructions as their client operates from KwaZulu-Natal and the availability of counsel to draft the papers. Though the reasons advanced are to my mind weak to say the least, the length of the delay is not inordinately long and as I have to consider the two together and not in isolation, I am persuaded to grant the condonation sought.

[3] The respondent provided the Department of Housing - KwaZulu-Natal (DoH) with the supply of services for rectification of houses contracted during the period 1994 until April 2002 and rehabilitation services of 610 damaged houses in the Emnambithi Municipality area as well as building completely new house for the DoH. When charging DoH the respondent charged VAT of 14% which was paid by DoH. DoH picked up that it had paid VAT to the respondent when in fact it should not have and took a decision to stop paying the respondent. The respondent claimed the VAT back from the appellant and requested a revised assessment reflecting a zero rating. In doing so the respondent was claiming a refund which was refused by the appellant. The appellant went even further by disallowing the respondent's objection which then led to the appeal being lodged with the Tax Court which decision is on appeal to this court.

[4] The respondent contends that the supplied services to DoH were rendered in terms of the Housing Subsidy Scheme alluded to in section 3 (5) (a) of the Housing Act and as such the appellant had incorrectly levied VAT at 14% in respect of the

supplies mentioned above. This was taken up on appeal to the Tax Court and Mali J found in favour of the respondent. She ordered the appellant to pay back the VAT refund in the amount of R38 162 303.07 to the respondent with interest from the date of the judgment at a rate of 9% with each party to pay their own costs. In the Tax Court the appellant submitted it was legally correct to levy VAT at 14% on the respondent who deemed to have supplied services to a provincial Human Settlement department under the Rectification Programme and the Emergency Assistance Programme for the VAT period July 2008 until September 2010. Thus the respondent contends that the services it rendered were in accordance with the Housing Subsidy Scheme and as such should be zero-rated in terms of section 11 (2) (s) of the VAT Act and the appellant ought to reduce the assessment raised and refund the respondent.

[5] The appellant's fortified in their view that they were entitled to charge VAT at the standard rate of 14% and that section 11 (2) (s) of the VAT Act was not applicable, thus we find ourselves on this venture of interpreting the relevant sections mentioned above. However, before doing so the appellant requires of this court to find that the Tax Court erred on either a policy, statutory or evidentiary level and/or on all three levels when it found that that the appellant was wrong in charging the VAT that it did. A finding on any one of these levels will put to bed the matter and there will be no need to deal with the other levels, so the argument goes.

Policy point of law raised

[6] The first point of law raised by the appellant is that the Tax Court erred on a policy level when it encroached on the executive terrain. In developing this argument the appellant contends that the appellant only consulted National Treasury, which it did in this case, on big policy issues which could influence a policy query. On enquiry the National Treasury would then confirm its policy position on an issue so queried. Now in the trial, as argued correctly by the respondent, the appellant's own witness, Mr Bailie, a senior specialist in legal and policy at SARS with 30 years' experience, conceded that no specific policy had been given from National Treasury in respect of this specific case from DoH. In addition the respondent points out correspondence of

25 November 2011 where the appellant informs the respondent's tax representative that there was no formal regulation as yet and that same was still in the process of being prepared for VAT rates applicable to subsidy payments. A further indicator pointed out by the respondent is the letter dated 23 May 2011 where the appellant writes to the Minister of Finance recommending that a standard rating for VAT for purposes of rectification and revitalization work on low cost housing be confirmed. Coupled with this no documentary proof of such policy which the appellant places reliance on was produced at the trial in the Tax Court.

[7] What is evident to me from the record in these proceedings is that the National Treasury, as stated in the correspondence and the testimony were still in discussions on how to deal with the sections required to be interpreted. That being said the respondents are correct in asserting that there was no policy which the Tax Court was going to usurp and therefore in my view the appellant's argument on the policy level must fail.

The interpretation of section 11 (2) (s) read with section 8 (23) of the VAT Act and section 3 (5) (a) of the Housing Act

[8] I find it prudent that I commence by setting out the relevant statutes pertinent to this specific matter. Thereafter I will proceed to engage in the interpretation of the relevant statute. The first relevant section is that of section 7 (1) (a) of the VAT Act which states the following:

"7(1) Subject to the exemptions, exceptions, deductions and adjustments provided for in this Act, there shall be levied and paid for the benefit of the National Revenue Fund a tax, to be known as value-added tax-

(a) on the supply by any vendor of goods or services supplied by him on or after the commencement date in the course or furtherance of any enterprise carried on by him;"

Thus value added tax is levied or paid on the supply by a vendor of goods or services in the course or furtherance of his/ her enterprise.

Section 11 of the VAT Act provides that where ordinarily a vendor would have been charged VAT but for this section read with subsection 3 of section 11, the charge of tax would be zero-rated. In this instance we are concerned with section 11 (2) (s):

"Where, but for this section, a supply of goods would be charged with tax at the rate referred to in Section 7 (1), such supply of goods shall, subject to compliance with subsection (3) of this section, to be charged with tax at the rate of zero percent where;-

...

(s) The services are deemed to be supplied to a public authority or municipality in terms of Section 8 (23); or"

In this matter it is common cause that the services were supplied to a public authority or municipality. The spanner in the works is whether these services were in terms of section 8 (23) of the VAT Act.

Section 8 (23) states:

"For the purpose of this Act, a vendor shall be deemed to supply services to any public authority or municipality to the extent of any payment in terms of the Housing Subsidy Scheme referred to in Section 3 (5) (a) of the Housing Act, 1997 (Act no 107 of 1997), made to or on behalf of that vendor in respect of the taxable supply of goods and services by the vendor."

[9] In this instance, in order for the vendor to receive a zero-rating on the payment for goods supplied or services, in terms of the VAT Act, it is required that the payment fall within the ambit of the Housing Subsidy Scheme referred to in section 3 (5) (a) of Housing Act. For easy reference I set out section 3 (5) (a) to (d) below:

"The following housing assistance measures, which were approved for financing out of the Fund in terms of Section 10A,10B,10C or 10D of the Housing Act, 1966 (Act 4 of 1966), are deemed to be National Housing Programmes instituted by the Minister under subsection (4) (g):

(a) The Housing Subsidy Scheme;
(b) The Guidelines for the Discount Benefit Scheme to promote Home Ownership, subject to section 17;
(c) The Hostels Redevelopment Programme: Policy for the Upgrading of Public Sectors Hostels;
(d) The Criteria and procedures governing the allocation of the built and Connected Infrastructure Grant until it is phased out on a date determined by the Minister in consultation with the Minister for Provincial Affairs and Constitutional Development."

[10] The appellant contends that none of the services rendered by the respondent falls within the categories set out in section 3 (5) (a) to (d) above and as such this should be the end of the road for the respondent, if one is interpreting the said statute. Thus the respondent's services supplied under the Rectification Programme and the Emergency Assistance Programme do not fall under the Housing Subsidy Scheme and as such none of them fall under the Housing Act, 2007, so the argument goes. The appellant persists that there is no need to even look at the National Housing Code, 2009 as it does not add value to the debate.

[11] I am of the view that disregarding the National Housing Code is where the appellant's problem lies in addition to ignoring the rule of interpretation. The court a quo was correct when it stated that the only way one was able to attain the definition of housing subsidy as it was not catered for in the definitions of the Housing Act, was by way of the National Housing Code as this was the only piece of legislation that had a definition of what defined a housing subsidy. The court a quo was also correct in using the principles of interpretation enunciated in *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) at [18].*

[12] In a nutshell the respondent argued that the letter dated 22 March 2005, the guidelines to the National Housing Programme, the rectification of houses delivered for 1994 to 2002 and the agreement between the appellant and the DoH clearly indicates that the appellant's intention was to fund the services to be provided by the respondent through the Housing Subsidy Scheme or at the least as indicated in Annexure C of the Policy and Procedure which makes provision for the various subsidy programmes. Which incidentally was not disputed by the appellant but what rather emerged was that DoH was wrong in doing so.

[13] What did the court a quo have before it when it made its decision? It had an approved submission from the MEC for Local Government Housing and Traditional Affairs KZN, for a service provider to rehabilitate and repair houses in Emnambithi area. This document specified that the subsidy amount of R54 650.00 was to be allocated for informal structures and a specific amount of R32 065. 92, in terms of the financial provisions, allocated for formal structures. This was followed on by the

contract which was concluded between the service provider and DoH which stated that the VAT will be treated as follows:

'The Developer hereby acknowledges that services rendered in accordance with the provisions of the Housing Subsidy Scheme are zero rated for Value Added Tax in accordance with Section 11 (2) (s) of the Value Added Tax Act, 89 of 1991.'

[14] As regards the evidence the court a quo had before it the testimony of Mr Bailie, a witness for the appellant, who testified that DoH had the thinking of zero rating the housing subsidies in order to deliver more houses. I find that the evidence of Mr Bailie is fortified in Chapter 8 - Guide to Fixed Property and Construction, of the SARS VAT GUIDE 409 26 March 2013 Edition at

> "8.5.1 Various amendments to the VAT Act were therefore made with effect from April 2005 to clarify the position, including:
>
> - Section 8(23) and 11(2)(s) were introduced to zero rate housing subsidy receipts for the construction of low cost housing under the Housing Subsidy Scheme in terms of section 3 (5) (a) of the Housing Act, 1997 (the Housing Act);"

[15] In addition, the testimony of Ms Sheasby, the auditor whom dealt with the respondent's objection, stated that she commenced her assessment with the incorrect material facts as evidence before her when she conducted the respondent's assessment. Thus her decision was based on wrong facts and the court a quo was correct in pointing this out.

[16] Bearing in mind that the only pieces of legislation which make mention of what constitutes a housing subsidy scheme is found in the National Housing Code. The initial code of 2000 was revised and the National Housing Code, 2009 came into operation which was meant to simplify the implementation of the housing projects and be less prescriptive by providing clear guidelines. It is stated specifically at Part C of the revised National Housing Code of 2009:

"2.4 VALUE -ADDED TAX

..., housing subsidies fall within the definition of "transfer payments" as contemplated in the Value Added Tax Act, 1991(Act No.22 of 1991) and is subject to VAT at a rate of zero percent (0%).

2.10 THE HOUSING SUBSIDY SYSTEM

The National Housing Programme are administered through the Housing Subsidy System (HSS)... "

[17] In addition there was the conduct of the appellant in dealings with previous projects similar to that which the respondent had undertaken, specifically the Thubelisha Homes project. From correspondence on record from the appellant to Thubelisha Homes dated 13 May 2008, Thubelisha Homes as an agent to DoH, were advised that they would be entitled to qualify to acquire the goods and/or services at a zero rate in terms of section 11 (2) (s) read with section 8 (23) of the VAT Act.

[18] Lastly, the costing of the rectification work was as far back as 22 March 2005, not to exceed the detailed breakdown of the housing subsidy. This was as per correspondence from the Acting Director General of DoH to the Head of Department of DoH.

[19] In light of the above, reading the statutes with each other rather than in isolation, looking at the circumstances and the intention of the legislature as regards what they aspired to achieve and the purpose of the statutes together with the manner in which they had dealt with a previous matter akin to this matter of the respondents, all these factors weighed and examined collectively, as instructed by *Natal Joint Municipal Pension Fund* supra, there can be no doubt that the payments made by DoH were payments in terms of section 3 (5) (a) of the Housing Act.

[20] The appeal of the appellant must fail.

Cross Appeal – Interest payable

[21] There is nothing contentious as regards this aspect as both parties place reliance on section 189 (3) of the Tax Administration Act, 28 of 2011. It is common cause that the interest in respect of the refund payable by the appellant if not paid on the effective date (that being the date when tax is due and payable for that tax period) is liable to run from that date. Thus the court a quo erred when it ordered that interest was to run from the date of the order. In addition the rate of interest was incorrectly calculated by the court a quo and this too amounts to an error on the part of the court a quo. The appellant provided the publication duly prescribed by the

Minister of Finance in terms of interest to be levied on debts owing by the state in terms of section 80 (2) of the Public Finance Management Act, 1 of 1999 and for the period of the relevant tax assessment (1 January 2011 to 28 February 2014) the applicable rate is gazetted as 8, 5%. The rate has changed further from 1 March 2014 to 28 February 2015 to 9% and lastly to 10, 5% for the period 1 March 2015 to 28 February 2016.

[22] The applicable rate in this instance is as set out in the preceding paragraph and not 9% as ordered by the court a quo. The cross appeal therefor succeeded.

Costs.

[23] This matter though it was an appeal in the tax court was conducted in the form of a trial. The court a quo sets out the reasons why it granted costs in the manner that it did, that each party pay its own costs. In the appeal process the appellant seeks a costs order if it is successful and on the other side so too does the respondent. In this instance I am of the view that the principles set out in *Affordable Medicines Trust and Others v Minster of health and Others 2006 (3) SA 247 (CC) at [138]* and further reiterated in *Biowatch Trust v Registrar, Genetic Resources and Others 2009 (6) SA 232 (CC) at [24]* are applicable in that the government organ having lost the appeal is to pay the costs of the respondent. I say so because the writing was on the wall from the onset that a zero-rating should be applied however even in the face of all the evidence supra and that on record the appellant still persisted to resist paying the respondent its refund.

[24] The respondent seeks costs for the employment of two counsel and I am of the view that this is warranted taking into account the volume of the work as regards the interpretation of the applicable statutes.

[25] Thus the appeal is dismissed with costs. Such costs to include the employment of two counsels.

[26] The cross appeal succeeds and as the error was not of any one of the parties' doing but rather that of the court a quo each party pays their own costs as regards the cross appeal.

[27] Consequently the following order is made:

[1] The appeal of the appellant, SARS, is dismissed with costs such costs are to include the employment of two counsels;

[2] The respondent, Amawele Joint Venture CC, succeeds in the cross appeal with each party to pay their own costs:

[3] The refund due to be paid by SARS to the respondent, Amawele Joint Venture CC, in the sum of R38 162 303.07 for the VAT periods 07/ 2008 to 09/2010 is with interest as set out below:
For tax assessment period 1 January 2011 to 28 February 2014 the applicable rate as gazetted is 8, 5%;
For the period 1 March 2014 to 28 February 2015 the applicable rate is 9%;
Lastly 10, 5% for the period 1 March 2015 to 28 February 2016.

W. Hughes
Judge of the High Court Gauteng Division, Pretoria

I agree.

L.M. Molopa-Sethosa
Judge of the High Court Gauteng Division, Pretoria

I agree.

S.P. Mothle
Judge of the High Court Gauteng Division, Pretoria

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