



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: A141/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: YES
DATE	SIGNATURE
25/1/2024	[REDACTED]

DORKING AFRICA (PTY) LTD

Appellant

and

**COMMISSIONER FOR THE SOUTH AFRICAN
REVENUE SERVICE**

Respondent

NEUKIRCHER J (HOLLAND –MUTER J AND MOOKI AJ CONCURRING):

[1] This appeal comes before us by way of leave granted by Mali J¹, against the whole of her judgment and order delivered on 19 November 2021. The court a quo

¹ Sitting as the Tax Court a quo

dismissed the appellant's application for final relief under Section 129(2) of the Tax Administration Act 28 of 2011 (the TAA).

[2] The appellant had applied for condonation and reinstatement of the appeal as it had failed to timeously apply for a date of hearing within 60 days of delivery of the Notice of Appeal². This was not opposed and condonation was granted at the hearing of the appeal.

THE FACTS

[3] The respondent issued an additional assessment with respect to the appellant's 2012 income tax year of assessment. In this, it disallowed the appellant's assessed loss of R38 587 720-00. As a result of the disallowance, the appellant was assessed as owing the respondent an amount of R1 357 322-85³.

[4] The appellant's objection to this assessment was rejected by respondent on 10 June 2016 as it alleged that appellant had failed to fully discharge its onus of proof as required by section 102⁴ of the TAA. This prompted an appeal which was delivered via the e-filing portal on 22 July 2016 and a reference number of CN207618167 was generated.

² Rule 49(6)(a)

³ In addition, an understatement penalty and interest was payable by appellant.

⁴ Section 102 states:

(1) A taxpayer bears the burden of proving— (a) that an amount, transaction, event or item is exempt or otherwise not taxable; (b) that an amount or item is deductible or may be set-off; (c) the rate of tax applicable to a transaction, event, item or class of taxpayer; (d) that an amount qualifies as a reduction of tax payable; (e) that a valuation is correct; or (f) whether a 'decision' that is subject to objection and appeal under a tax Act, is incorrect.

(2) The burden of proving whether an estimate under section 95 is reasonable or the facts on which SARS based the imposition of an understatement penalty under Chapter 16, is upon SARS.

[5] It is this Notice of Appeal that forms the subject matter of the present proceedings as the appellant alleges that:

- a) the Notice of Appeal complies with Tax Court Rule 10(2)(a);
- b) that the respondent failed to provide their statement of grounds of assessment and/or opposition to the appeal as Tax Court Rule 31 provides;

[6] The respondent alleges that Tax Court Rule 31 was not triggered as the appellant failed to set out their grounds of appeal in their Notice of Appeal: ie the Notice of Appeal is fatally defective.

[7] With the factual situation such that respondent had failed to respond to appellant's Notice of Appeal, the appellant delivered a Notice in terms of Tax Court Rule 56(1)(a)⁵ to respondent on 2 July 2019. This informed respondent that appellant intended to apply to the Tax Court for a final order in terms of section 129 of the TAA should respondent fail to file its Rule 31 statement within 15 days. The respondent did not comply, and on 14 August 2020 the appellant delivered it's the threatened application.

[8] Prayer 1 of that Notice of Motion reads as follows:

⁵ 56. Application for default judgment in the event of non-compliance with rules

(1) If a party has failed to comply with a period or obligation prescribed under these rules or an order by the tax court under this Part, the other party may—

(a) deliver a notice to the defaulting party informing the party of the intention to apply to the tax court for a final order under section 129(2) of the Act in the event that the defaulting party fails to remedy the default within 15 days of delivery of the notice; and

(b) if the defaulting party fails to remedy the default within the prescribed period, apply, on notice to the defaulting party, to the tax court for a final order under section 129(2).

(2) The tax court may, on hearing the application—

(a) in the absence of good cause shown by the defaulting party for the default in issue make an order under section 129(2); or

(b) make an order compelling the defaulting party to comply with the relevant requirement within such time as the court considers appropriate and, if the defaulting party fails to abide by the court's order by the due date, make an order under section 129(2) without further notice to the defaulting party.

“1. That final relief be granted in favour of the Applicant, as contemplated in Section 129(2) of the Tax Administration Act, 28 of 2011 (as amended), and that it be ordered that the Respondent's additional assessment in respect of the Applicant's 2012 income tax year of assessment (in terms whereof the Applicant's assessed loss in the amount of R38 587 720.00 was disallowed) be set aside.”

[9] As stated, that application was unsuccessful a quo.

THE MAIN CONTENTIOUS ISSUE

[10] The essence of this dispute revolves around whether or not the appellant's Notice of Appeal complied with Tax Court Rule 10(2)(a).

[11] Tax Court Rule 10(2)(a) provides:

“10. Appeal against assessment

...

(2) A notice of appeal must –

(a) be made in the prescribed form; ...”

[12] It is not in dispute that a Notice of Appeal was in fact filed. However, it is in dispute that the Notice of Appeal complied with Tax Court Rule 10(2)(a) specifically in that it failed to set out the grounds of appeal. It is for this reason that the respondent argues Tax Court Rule 31 was not triggered.

[13] Tax Court Rule 31 provides:

“31. Statement of grounds of assessment and opposing appeal

(1) SARS must deliver to the appellant a statement of the grounds of assessment and opposing the appeal within 45 days after delivery of—

(a) the documents required by SARS under rule 10(5);

(b) if alternative dispute resolution proceedings were followed under Part C, the notice by the appellant of proceeding with the appeal under rule 24(4) or 25(3);

(c) if the matter was decided by the tax board, the notice of a de novo referral of the appeal to the tax court under rule 29(2); or

(d) in any other case, the notice of appeal under rule 10.

(2) The statement of the grounds of opposing the appeal must set out a clear and concise statement of—

(a) the consolidated grounds of the disputed assessment;

(b) which of the facts or the legal grounds in the notice of appeal under rule 10 are admitted and which of those facts or legal grounds are opposed; and

(c) the material facts and legal grounds upon which SARS relies in opposing the appeal.

(3) SARS may include in the statement a new ground of assessment or basis for the partial allowance or disallowance of the objection unless it 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.”

[14] The argument is a logical one: Tax Court Rule 31 calls for a “statement of grounds of assessment and opposing appeal.” Where no proper grounds upon which the appeal is founded are set out in the Notice of Appeal, there is no case to which an answer is required. Therefore, the Rule 56 application is stillborn.

[15] In support of its argument that a Notice of Appeal in terms of Tax Court Rule 10(2)(a) was submitted, the appellant relies on the affidavit of its chartered accountant Mr Tromp who *inter alia* states:

"9.9.1 The Applicant 's notice of appeal was delivered via SARS' eFiling portal on 22 July 2016.

9.9.2 A true copy of the Applicant's notice of appeal is attached to Mr Van Niekerk's founding affidavit marked annexure 'D'.

9.3 At the time of delivery of the applicant's notice of appeal (22 July 2016), the due date for filing of the notice of appeal had not lapsed.

9.9.4 As can be seen from annexure 'JPT1' attached hereunto, which is a copy of the screenshot of the 'dispute work page', the Applicant's notice of appeal was sent to SARS on 22 July 2016 and the 'dispute supporting documents' which included the Applicant's grounds of appeal, were attached as an annexure and consisted of four documents, with a kilobyte (KB) size of 1488. I also attach hereunto as annexure 'JPT2' screenshot depicting the information contained on SARS eFiling profile where I prompted a 'dispute search'. Thereon I have highlighted in red the reference to the Applicant's 'notice of appeal' where it can be noted that the status was indicated as 'sent to SARS' and under the column headed 'Supporting Documents it was recorded as being 'submitted'."

[16] It may well be that Mr Tromp's evidence is uncontested, but that is not the end of the inquiry as the true question is - what "dispute supporting documents" were filed on 22 July 2016? According to Mr Tromp these

"... included the Applicant's grounds of appeal, [which] were attached as an annexure and consisted of four documents..."

As this presently reads, the four documents consisted of the grounds of appeal and three other documents - but nowhere does he mention what these documents were. All he says is that they were 1488kb and the screenshot on the SARS eFiling profile is given. There it states that according to SARS the Notice of Appeal was sent as were the supporting documents⁶. Mr Tromp says that these constitute the appellant's grounds of appeal.

[17] But the respondent has provided proof of the four documents that were submitted with the Notice of Appeal. There were:

- a) the identity document of one William Hermanus van Niekerk;
- b) the identity document of Mt Tromp;
- c) a special power of attorney to the tax practitioner; and
- d) a letter dated 4 July 2016.

[18] The letter dated 4 July 2016 states:

"I refer to your outcome letter dated 10 June 2016 notifying the taxpayer ("Dorking") of the disallowance of the Objection ("NOO1") submitted 5 May 2016.

I herewith confirm that I have been appointed by the taxpayer in terms of a Special Power of Attorney to advise and deal with the further processes as detailed in Chapter 99, Dispute Resolution, of the Tax Administration Act, Act 28 of 2011 ("TAACT").

The taxpayer feel aggrieved about the outcome of the NOO1 and are of the opinion that sadly, all the facts and circumstances have not been fully

⁶ This is attached as Annexure JPT2.

understood and/or incorporated when the decision to disallow the NOO1 was considered.

In terms of sec 107(2) of the TAACT the company has a minimum of 45 business days in which to submit a Notice of Appeal ("NOA") should the taxpayer feel aggrieved with the unfavourable outcome of the NOO1. It also addresses the fact that there must be exceptional circumstances to warrant the later submission.

It is therefore desirable of the taxpayer to advise SARS accordingly that Dorking is in the process of preparing a NOA. However, due to the complexity of the matters as well as the materiality of the amounts in dispute, Dorking appointed additional service providers as well as 'exceptional circumstances'. Furthermore, the Promotion of Administrative Justice Act 3 of 2000 ("PAJA") also allow rights to the taxpayer in terms of a fair process.

Please note herewith our intention to submit an NOA within the taxpayer's rights as per the TAACT."

[19] Thus, these being the documents received by SARS, no grounds of appeal were sent or received.

[20] This being so, it is our view that the Tax Court correctly found that the respondent was not obliged to file a Rule 31 statement as no proper Notice of Appeal was filed in terms of Tax Court Rule 10(2)(a), and it correctly dismissed the appellant's Rule 56 application.

[21] This being so the present appeal must, too, fail.

ORDER

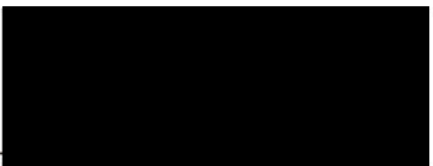
1. The appeal is dismissed with costs.

I agree


NEUKIRCHER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

I agree


HOLLAND-MUTER J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA


MOOKI AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 25 January 2024

For the appellant	:	ADV PA SWANEPOEL
Instructed by	:	JI VAN NIEKERK INC
For the respondent	:	ADV HASKINS
Instructed by	:	S MANAKA
Matter heard on	:	30 AUGUST 2023
Judgment date	:	<u>25</u> JANUARY 2024