IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

18/11/2013.

CASE NO: SARS 4/2013

In the matter between:

JEN-CHIH HUANG and 13 OTHERS Applicants

and

(1)	REPORTABLE:	~~YES~~ / NO
(2)	OF INTEREST TO OTHER JUDGES:	~~YES~~ / NO

18/11/13 .... DATE

.... SIGNATURE

COMMISSIONER OF THE SA REVENUE SERVICE First Respondent

ADV PJJ MARAIS NO Second Respondent

In re:

COMMISSIONER OF THE SA REVENUE SERVICE Applicant

and

JEN CHIH HUANG and 13 OTHERS

JUDGMENT

Tuchten J:

1 On 9 October 2013, Ledwaba DJP, sitting in chambers, heard an *ex parte* application ("the inquiry application") and granted an order ("the inquiry order") at the instance of the Commissioner for the SA Revenue Service ("SARS") designating the second respondent ("the presiding officer") to act as presiding officer in an inquiry ("the inquiry") to be held in terms of Part C of the Tax Administration Act, 28 0f 2011 ("the TAA").

2 The purpose of the inquiry was stated in the order as being an investigation into the alleged non-compliances with the provisions of the certain identified tax legislation by the first, second and third applicants and 91 other named juristic persons. The inquiry was convened to begin on 11 November 2013, the day the present application was set down for hearing.

3 The order for the inquiry was preceded by a successful *ex parte* application ("the warrant application") for a search and seizure warrant ("the warrant") before Van der Merwe DJP in chambers on 18 April 2013, authorising the search for and the seizure of certain material affecting the first three applicants. The first and second applicants are married to each other. They control the third applicant.

4 The searches were carried out on 26 April 2013 and a large number of documents were seized. The present applicants then brought an application for the reconsideration ("the reconsideration application") of the warrant application on various grounds, amongst which were that rule 6(12(c) permitted a reconsideration of an order granted in the absence of a party.[1] SARS' answering affidavit was sworn on 15 July 2013 and was presumably delivered shortly after that date. The applicants did not deliver a replying affidavit but set the matter down for hearing on 28 October 2013.

5 Because there was no replying affidavit filed, the applicants unilaterally removed the reconsideration application from the roll. Although the unilateral removal was probably irregular and invalid, SARS did not seek to have the reconsideration application argued on the date allocated. To date no replying affidavit has been delivered and the reconsideration application has not been re-enrolled.

6 SARS has to date not supplied the applicants with a copy of the inquiry application.

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1 Rule 6(12(c) reads: A person against whom an order was granted in his absence in an urgent application may by notice set down the matter for reconsideration of the order.

7 In their notice of motion in the present application, the applicants seek a direction that the inquiry should not proceed until the reconsideration application has been adjudicated. They further seek orders directing SARS to give them a copy of the inquiry application, giving them leave to supplement their founding affidavit after they receive the inquiry application and setting the inquiry aside. In addition, the applicants seek, conditionally, an order declaring certain sections of the TAA unconstitutional and thus invalid.

8 Before me only the postponement of the inquiry was sought urgently. In reply, counsel for the applicants confined the urgent relief sought to orders that until the final outcome of the reconsideration application, the first, second and third applicants be excused from giving evidence at the inquiry until the determination of the reconsideration application and that, until then, no document or information derived from the search and seizure under the warrant be employed in the examination of any witness.

9 Although any form of postponement of the inquiry and any limitation on the power of the presiding officer to receive any information, documentary or otherwise, was vigorously resisted on behalf of SARS, this formulation of the relief sought was accepted by SARS if I ruled that a postponement of the applicants' duty to give evidence at the

inquiry were justified. But counsel for SARS submitted that the postponement order should make plain that documents or information obtained by SARS from sources other than the search and seizure might notwithstanding any order be presented or adduced at the inquiry. In other words, that the mere fact that a document was obtained in the search and seizure or that an item of information available to SARS did not preclude the presiding officer from receiving a similar or identical document or an item of information obtained from a source other than the search and seizure. I shall deal with this below.

10 The argument before me was wide ranging but because I am called upon only to pronounce on the postponement and the use of documents and information pending the determination of the reconsideration application, and to do so urgently, I shall not deal in this judgment with the considerations which led me to come to my conclusions.

11 In my view the issues before me turn on the issue of convenience in the administration of justice. This requires an analysis of the powers of a presiding officer in an inquiry convened under the TAA and of the status, at such an inquiry, of information derived from a search and seizure under a warrant which may potentially be declared invalid.

12 As I see it, the starting point is that our taxation system is one of self-assessment. In the broadest terms, a taxpayer calculates his income and legitimate deductions and declares his taxable income based on these, his own, calculations. Under ss 29 to 31 of the TAA, a taxpayer must keep all records, books of account and documents that enable him to comply with the TAA or are specifically required under a tax Act (as defined) or to enable SARS to be satisfied that he has observed these requirements and must make them available for inspection.

13 SARS has broad powers under ss 59 to 64 of the TAA to search premises for and seize "relevant material", defined in s 1 to mean any information, document or thing that is foreseeably relevant for tax risk assessment, assessing tax, collecting tax, showing non-compliance with an obligation under a tax Act or showing that a tax offence has been committed.

14 But such a search and seizure can only take place under the authority of a warrant issued by a judge or, where relatively small amounts are involved, a magistrate. Section 59(2) prescribes that SARS must apply *ex parte* for such a warrant. Such an application is a judicial proceeding. Special procedural rules are applicable to such *ex parte* applications. In particular, a person affected by such an application and the order made *ex parte*, in this case that a warrant issue, may

apply for the reconsideration of the *ex parte* order. The reconsideration application to which I referred above was brought precisely under these circumstances.

15 The fact of the *ex parte* order gives the applicant for that order, in this case SARS, no special status. A reconsideration application involves a rehearing of the application but with additional material added, usually in the form of an answer to the allegations made for the purpose of the initial *ex parte* proceedings and a reply by the *ex parte* applicant. In the present case the applicants wish to deliver an affidavit in reply to that last mentioned affidavit of SARS as *ex parte* applicant. As I understood the debate before me, SARS does not dispute the applicants' right to have the last evidential word in the reconsideration application but complains that if and when it is delivered it will be late and thus may only be received in evidence on condonation of its lateness.

16 Although the search and seizure process potentially invades the privacy and dignity of the subject of the process, the process itself is permissible and, indeed, essential in a constitutional state such as ours if conducted strictly in accordance with law. But the law also recognises that when the warrant under which a seizure has been made is unlawful, the court which finds the warrant to be unlawful may

in certain circumstances direct that the evidence seized pursuant to the unlawful warrant may be preserved. That is certainly the case where criminal proceedings are pending.[2] It was submitted that *Ivanov v North West Gambling Board and Others*[3] was authority for the proposition that where no criminal proceedings are pending, no preservation order is competent. I do not agree. In *Ivanoff*, the facts were that an order setting aside the warrant was granted and the question of return of the seized items postponed for later consideration. The *Ivanoff* court refused to grant a preservation order on equitable grounds, not on principle. And s 66(4) of the TAA specifically empowers the court to authorise SARS to retain the seized material or copies in the interests of justice.

17 To summarise: in principle, despite the applicants' tardiness, the court hearing the reconsideration application may uphold the attack on the warrant application and set the warrant aside. That court may, if it upholds the attack, also direct that some or all the seized material be returned to the applicants but that does not inevitably follow upon a successful attack on the warrant. And in considering whether or not to grant a preservation order, a court may have regard to the fact that

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2 *Thint (Pty) Ltd v National Director of Public Prosecutions and Others; Zuma and Another v National Director of Public Prosecutions and Another* 2009 1 SA 1 CC paras 220-223

3 2012 6 SA 67 SCA para 30

amongst the material seized under the hypothetically invalid warrant is material which the taxpayer ought under the TAA to have made available to SARS upon its request.

18 I turn to consider the powers of the presiding officer. Under s 52(1) of the TAA, he determines the conduct of the inquiry as he sees fit. Under s 54, the presiding officer has the same powers as are vested in the President of the tax court under ss 127 and 128. Section 127 is relevant for present purposes and reads:

> Non-attendance by witness or failure to give evidence
> (1) A person subpoenaed under section 126 is liable to the fine or imprisonment specified in subsection (2), if the person without just cause fails to-
> (a) give evidence at the hearing of an appeal;
> (b) remain in attendance throughout the proceedings unless excused by the president of the tax court; or
> (c) produce a document or thing in the person's possession or under the person's control according to the subpoena.
> (2) The president of the tax court may impose a fine or, in default of payment, imprisonment for a period not exceeding three months, on a person described in subsection (1) upon being satisfied by-
> (a) oath or solemn declaration; or
> (b) the return of the person by whom the subpoena was served,

> that the person has been duly subpoenaed and that the person's reasonable expenses have been paid or offered.
> (3) The president of the tax court may, in addition to imposing a fine or imprisonment under subsection (2), issue a warrant for the person to be apprehended and brought to give evidence or to produce the document or thing in accordance with the subpoena.
> (4) A fine imposed under subsection (2) is enforceable as if it were a penalty imposed by a High Court in similar circumstances and any laws applicable in respect of a penalty imposed by a High Court apply with the necessary changes in respect of the fine.
> (5) The president of the tax court may, on good cause shown, remit the whole or any part of the fine or imprisonment imposed under subsection (2).
> (6) The president of the tax court may order the costs of a postponement or adjournment resulting from the default of a witness, or a portion of the costs, to be paid out of a fine imposed under subsection (2).

19 It will be seen that the presiding officer's powers relate only to the imposition of criminal sanctions for failures to give evidence or produce documents or things at the inquiry. It is in that context that the presiding officer determines the existence or otherwise for the refusal to testify at all or in relation to a particular question or in relation to the production of a document. A presiding officer is not empowered in so many words to conduct the kind of inquiry contemplated in the reconsideration application. And the challenge which will almost certainly be mounted at the inquiry will not only take place when one

of the applicants gives evidence but also when other witnesses testify.[4] The challenge, as identified before me, will broadly be that a document was obtained unlawfully and, thus, should not be used in the inquiry at all. In addition there will be challenges to what the applicants will contend is evidence derivatively obtained from the hypothetically unlawful seizure of the document in question. The presiding officer cannot be expected to evaluate the prospects of success of these kinds of challenges. A presiding officer cannot exercise a discretion under s 66(4) 0f the TAA because that discretion is vested only in the court. A presiding officer most certainly should not and, I have no doubt, would not risk encroaching onto the terrain of the court hearing the reconsideration application.

20 All this would make for a most unwieldy enquiry should the urgent relief ultimately formulated by counsel for the applicants not be granted. Against this, SARS would suffer little prejudice. The inquiry will continue and the obligation of the applicants to give evidence will merely be postponed, unless their proposed challenge to the order convening the inquiry is ultimately successful.

4 Counsel for SARS undertook in open court not to object to the presence of the applicants' legal representatives throughout the inquiry even though he made plain that the presiding officer would be asked to direct that the applicants should not be present during the examination of certain witnesses. The undertaking was made subject to certain confidentiality conditions with which I do not find it necessary to deal in the present context.

21 Counsel for SARS submitted that on the material presently before me I should find that the reconsideration application had no prospects of success. I do not think I should enter upon this issue. It is a matter for the court hearing the reconsideration application to decide.

22 Counsel asked me to make a ruling on the urgent relief and allow them to approach the court for further directions in relation to the balance of the relief sought on a non-urgent basis. I shall accede to this request. I would add that the facts placed before me justify a request to the registrar to allow the reconsideration application such promotion on the roll as circumstances may allow. No doubt, in accordance with the practice in this Division, the parties will approach the Deputy Judge-President in this regard.

23 I make the following ruling:

1 Until the final outcome of the reconsideration application pending in this court under case no. SARS 1/2013 ("the reconsideration application"):

1.1 the first, second and third applicants are excused from giving evidence at the inquiry convened before the second respondent as presiding officer pursuant to the order of Ledwaba DJP made under case no SARS 4/2013 on 9 October 2013 ("the inquiry"); and

1.2 no document or information derived from the search and seizure pursuant to the warrant issued by Van der Merwe DJP on 18 April 2013 be employed in the examination of any witness at the inquiry;

2 Nothing in the ruling in 1 above shall be interpreted to mean that any document or information obtained by SARS from a source other than the search and seizure effected pursuant to the warrant may not be presented or adduced at the inquiry.

3 For avoidance of doubt, it is declared that the mere fact that a document was obtained in or pursuant to such search and seizure or that an item of information became available to SARS pursuant to such search and seizure will not preclude the presiding officer from receiving a similar or identical document or an item of information obtained from a source other than the search and seizure.

4 The case will stand down to enable the parties to make submissions (which may include a recasting of the rulings above to achieve greater clarity and effectiveness) on the further conduct of the case.

5 The costs incurred to date will be reserved for the consideration of the court hearing the reconsideration application.

NB Tuchten
Judge of the High Court
18 November 2013

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