NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~/NO.

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

(3) REVISED.

30/11/2012

DATE SIGNATURE

Case No: 17583/2012

Date heard: ~~16 October 2012~~ 30/11/12

In the matter between:

SASOL OIL (PTY) LTD Applicant

And

COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE Respondent

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JUDGMENT

PHATUDI J:

[1] The applicant, a taxpayer as defined in the Income Tax Act 58 of 1962 (the Tax Act) seeks this court to review and set aside the decision raised and relied on by the Commissioner for the South African Revenue Services, (the Respondent) as the second ground in

the statement of grounds of assessment dated 2 December 2011 (the second ground).[1]

[2] In the alternative, the applicant seeks a declarator that the respondent's decision to raise the second ground is invalid on the basis of the constitutional principle of legality.[2]

[3] The respondent, as required in terms of the provisions set out in section 77(1) read with section 77(3) of the Tax Act determined the taxable amount Levi able under the Tax Act and is chargeable [3] on the applicant in respect of the 2005, 2006 and 2007 years of assessment. (original assessment)

[4] Pursuant to certain queries raised by the respondent relating to the applicant's tax affairs pertaining to the 2005 and 2006 years of assessment, the parties concluded an agreement[4] to extend the three year period of prescription in respect of 2005 and 2006 years of assessment.

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[1] Notice of Motion page 1; Founding Affidavit page 6.
[2] Notice of Motion page 1; Founding Affidavit page 7
[3] Assessment as defined in the Tax Act.
[4] Annexure A4 page 24 of record herein referred to as extension agreement.

[5] The queries raised by the respondent 'include issues relating to certain agreements entered into between the [applicant] and certain international parties, namely Sasol International Services Limited (SISL)... which company is registered in the United Kingdom and Sasol Oil International Limited (SOIL) ... which company is registered in the Isle of Man'.[5] The respondent request the applicant to furnish certain information as set out in the letter dated 8 July 2009.[6] Pursuant thereto the parties agreed that ' ... in order for the Commissioner to have sufficient time to analyse the information provided by the Taxpayer, it is to the best advantage to both the Taxpayer and the Commissioner that the Commissioner be afforded an extended time period within which to raise additional assessments in respect of the 2005 and 2006 year of assessment.

1.2 That the Commissioner be entitled to raise the 2005 and 2006 additional tax assessment at a date post the prescription date in accordance with section 79(1)(i)(bb) of the Act, subject to the provisions of clause 2 below.

2. TERMS OF THE AGREEMENT:

2.1 It is agreed that the Commissioner be permitted to raise additional tax assessment in respect of each of the 2005 and 2006 years of assessment on or before 30 April 2010. It is further agreed that the additional tax assessments will be restricted to issues pertaining to arrangements or agreements entered into

[5] Extention Agreement Annexure A4, page 25

[6] Annexure A5 page 29 – 38.

between the Taxpayer and SISL and SOIL, in terms of the letter of enquiry issued by the Commissioner, dated 8 July 2009, a copy of which is attached hereto.

2.2 It is agreed by both the Commissioner and the Taxpayer that, save for the agreed change of the date pertaining to prescription, the effect and content of section 79 of the Act will *mutatis mutandis* remain applicable between the Commissioner and the Taxpayer with regards to the 2005 and 2006 years of assessment.'

[6] Subsequent thereto, the respondent raised additional assessments in their letter dated 30 April 2010. The applicant sought additional reasons for the said additional assessments. On receipt thereto, the applicant objected to additional assessments which led to the applicant lodging an appeal with the Tax Court.

[7] On the 2 December 2011 the respondent delivered its statement of grounds of assessment as envisaged in terms of Rule 10 of the Tax Court Rules. The grounds of assessment are worded:

'Alternatively, the "net income" of SISL which was included in Sasol oil's "income" included the Assessed Amounts...

5.2.1 For the reasons discussed in paragraphs 2.7.1 to 2.7.3 above, during each relevant year (in terms of section 9D(2)), there was included in the "income" of

Sasol Oil for that year, "an amount equal to ... the net income" of SISL, determined for each "foreign tax year" of SISL which ended during the year.

5.2.2 The "net income" of SISL in respect of a "foreign tax year" was "an amount equal to the taxable income of [SISL] determined in accordance with the provisions of [the Income Tax] Act as if [SISL] had been a taxpayer, and as if [SISL] had been a resident for the purposes of the definition of "gross income"..."

5.2.3 In determining its taxable income a "resident" is entitled to deduct expenditure incurred by it which satisfies the requirements of section 11(a) and section 23 of the Income Tax Act.

5.2.4 Expenditure incurred for the purposes (and with the effect) of producing "income" (as defined in the Income Tax Act) is incurred "in the production of income" for the purposes of section 11(a), while expenditure incurred for some other purpose is not so incurred.

5.2.5 In order for expenditure to have been incurred "for purposes of trade" as contemplated in section 23(g) of the Income Tax Act, the expenditure must have been incurred for the purpose of the relevant taxpayer carrying on its profit making activities.'[7]

[8] The second ground is recorded as 'the "net income" of SISL which was included in Sasol Oil's "income" included the Assessed Amounts

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3.2.1 There was included in the "income" of Sasol Oil for each Relevant Year (in terms of section 9D(2)), "an amount equal to ... the net income" of SISL, determined for each "foreign tax year" of SISL which ended during that year.

3.2.2 Had SISL been a "resident" determining its taxable income in accordance with the provisions of the Income Tax Act, SISL would not have been entitled to deduct the expenditure incurred by it in purchasing the crude oil (in terms of the Second STI Supply Agreement) for the following reasons:

3.2.2.1 Such expenditure was not incurred "in the production of income" for the purposes of section 11(a) of the Income Tax Act because it was not incurred by SISL for the purpose of producing "income" (as defined in the Income Tax Act) for SISL.

3.2.2.2 Such expenditure was not incurred by SISL "for the purposes of trade" as contemplated in section 23(g) of the Income Tax Act because it was not incurred by SISL for the purposes of carrying on SISL's profit making activities

3.2.2.3 Therefore, the expenditure did not satisfy the requirements for deduction set out in sections 11(a) and 23(g) of the Income Tax Act.

3.2.3 Accordingly, the "net income" of SISL which was included in the "income" of Sasol Oil (in terms of section 9D(2)(a)) included the Assessed Amounts.'[8]

[9] The applicant's counsel[9] submits that the second ground is a completely new and different ground for holding the applicant liable for tax. He submits that the original ground focused on SOIL as the

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[9] Adv PA Solomon SC assisted by Adv Cane

controlled foreign company and treated it as having a taxable income on the basis of substance over form doctrine. He further submits that the new basis raised for the first time in terms of Rule 10 statement focus is on SASOL as the controlled foreign company and determined its taxable income not on the substance over form but on the basis of certain expenditure that would not qualify as deductions.

[10] He, on those basis, submits that the second ground is completely a new basis for seeking to hold the applicant liable because the factual and legal basis of the first and third grounds are completely different from the factual and legal basis of the new second ground.

[11] He lastly submits that the inclusion of the new second ground of assessment by the respondent is an attempt to achieve what the respondent cannot achieve in a manner he is required to do so in terms of section 79. This, he term "coming through the back door where he cannot come through the front door."

[12] The section relevant to assessments of taxpayers is section 77 of Income Tax Act. It provides:

'(1) All assessments required to be made under this Act shall, subject to the provisions of section three [3], be made by the Commissioner or under his direction

(2) ...

(3) Upon recording or filing the particulars of any assessment the Commissioner shall give notice of the assessment to the taxpayer...'

[13] Additional assessment is prescribed in section 79 of the Income Tax Act. (Tax Act). The relevant provisions provide;

'(1) If at any time the Commissioner is satisfied –

(a) that any amount which was subject to tax and should have been assessed to tax under this Act has not been assessed to tax; or

(b) that any amount of tax which was chargeable and should have been assessed under this Act has not been assessed; or

(c) ....,

He shall raise an assessment or assessments in respect of the said amount or amounts. notwithstanding that an assessment or assessments may have been made upon the person concerned in respect of the year or years of assessment in respect of which the amount or amounts in question is or are assessable, and notwithstanding the provisions of section 81(5), 83(18) and 83A (12):

Provided that the Commissioner shall not raise an assessment under this subsection-

(i) after the expiration of three years from the date of the assessment (if any) amount which should have been assessed to tax under such assessment was not so assessed or in terms of which the amount of tax assessed was less than the amount of such tax which was properly chargeable, unless-

(aa) the Commissioner is satisfied that the fact that the amount which should have been assessed to tax was not so assessed or the fact that the full amount of tax chargeable was not assessed, was due to fraud or misrepresentation or non-disclosure of material facts; or

(bb) the Commissioner and the taxpayer agree otherwise prior to the expiry of that three year period; or ...

(Emphasis added)'

[14] Other relevant provisions are: Sections 81 and 83(1). They provide:

Section 81

'(1) Objections to any assessment made under this Act shall be made in the manner and under the terms and within the period prescribed by this Act and the rules promulgated in terms of section 107A by any taxpayer who is aggrieved by any assessment in which that taxpayer has an interest.

(4) The Commissioner may on receipt of a notice of objection to an assessment alter the assessment or may disallow the objection and shall send to the taxpayer or his or her representative notice of such alteration or disallowance made in the assessment.

(5) Where no objections are made to any assessment or where assessments have been allowed in full or withdrawn, such assessment or altered assessment, as the case may be, shall be final and conclusive.'

Section 83(1):

'Any person entitled to object to an assessment of section 83A, appeal against such assessment to the tax court established in terms of the provisions of this section in the manner and under the terms and within the period prescribed by this Act and the rules promulgated in terms of section 107A'

[15] The objections by the taxpayer to any assessments are prescribed by the rules promulgated in terms of section 107A. Rule 10 provides that the '[c]ommissioner (respondent) must deliver to the taxpayer a statement of the grounds of assessment ...' Sub rule (3) provides that 'the statement of the grounds of assessment must be in writing and be signed by the Commissioner or his or her representative and must be divided into paragraphs

(a) setting out a clear and concise statement of the grounds upon which the taxpayer's objection is disallowed; and

(b) stating the material facts and legal grounds upon which the Commissioner relies for such disallowance'

[16] The applicant's counsel[10] submits that the respondent must consider and decide the basis upon which the taxpayer was liable for such tax. The respondent is however precluded from raising a revised assessment under section 79(1) after the expiry of three years from the date of the assessment unless the requirements of paragraph (aa) and (bb) are satisfied. Counsel refers me to **CSARS v Brummeria Renaissance (Pty) Ltd and Others** where the court held that '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.'[11]

[17] He further submits that section 79(1) only empowers the respondent to issue a revised assessment outside the period specified if the respondent satisfy himself that the amount which should have been assessed of tax chargeable was not assessed due

[10] Adv PA Solomon SC assisted by Adv JMA Cane SC
[11] 2007 (6) SA 601 (SCA)

to fraud or misrepresentation or non-disclosure of material facts by the applicant.

[18] He submits that the basis upon which the respondent relies on as raised for the first time in Rule 10 statement, focuses on Sasol as the controlled foreign company and determining its taxable income not on the basis of substance over form but on the basis of certain expenditures which the respondent alleges would not qualify as deductions in terms of the general deduction formula. He submits further that this basis upon which the respondent relies, is a completely new basis to hold the applicant liable. He refers this basis as the second ground.

[19] In rebuttal thereto, the respondents counsel[12] submits that the amounts included in the assessments, to which Sasol has objected, are the amounts described in each assessments as "imputed income CFC". He submits that first, second and third grounds relied on for adjusting the taxable income of Sasol as envisaged in terms of section 9D (2A).

[12] Adv. D Fine SC assisted by Adv J Boltar

[20] He further submits that the amount to which the second ground relates 'is the same amount to which the first and the third ground relates and pertains to the same arrangements as agreements and to which amount the respondent has already assessed the applicant.'

[21] He lastly submits that the second ground is not unrelated to the first and the third ground as contemplated in Rule 10(3) of the Tax Court Rules, which resulted in the inclusion of the second ground in the Rule 10 statement. Further, counsel submits that Rule 10(3) requires a statement of the grounds upon which the taxpayer's objection to an assessment "is disallowed" as opposed to "was disallowed". It is upon those basis that the Rule 10 statement includes all grounds (including the alleged second ground) for disallowing Sasol's objection, irrespective of whether or not such ground(s) were previously relied upon by the Commissioner.

[22] He refers me to ITC 1843 where it was held that 'the Commissioner is entitled to add new grounds to its Rule 10 statement different to that contained in the preceding correspondence' It is for that reason the

second ground has been included in the Rule 10 statement as required in terms of Rule 10(3).

[23] In my evaluation of the submissions made based on the evidence led, it is clear that the parties concluded an extention agreement to enable the respondent to raise additional assessment notwithstanding the prescribed three year period having expired. I refer to this extension agreement as a sweetener. The respondent is precluded in terms of section 79(1)(i) to raise an additional assessment after three years if the respondent has satisfied himself that the amount raised as additional assessment was not assessed in the original assessment due to fraud, misrepresentation or non-disclosure of material facts by the applicant.

[24] The respondent determined SOIL's taxable income and attributed it to Sasol Oil as envisage in terms of section 9D. As the respondent is obliged in terms of Rule 10 statement to set out grounds for disallowing the applicant's objections. The ground raised by the respondent does not relate to the position SOIL and its taxable

income. He took the view that Sasol is not entitled to certain deductions from its agreements.

[25] The original ground focused on SOIL as the controlled foreign company and substance over form doctrine was applied. This, in my view, creates a new basis on holding the applicant liable. The arrangement and agreements relied on for the first and third grounds are clearly not relevant to the second ground. I agree with the applicant's counsel that certain facts may overlap with different grounds for taxation, but that does not essentially make them the same grounds of taxation. In my view, that factual and legal basis of the first and third grounds are completely different from the factual and legal basis of the new second ground.

[26] The first and third ground are based on the taxable income of SOIL while the second is based on the taxable income of Sasol on the basis that it does not qualify under the general deduction formula.

[27] In **CSARS v Brummeria** case the respondent company obtained interest free loans to finance the construction of units. The

Commissioner's assessment of the companies tax contends that amounts equal to the value of the right of the companies to use the funds advanced to them interest free were included in the companies gross income. The SCA court held that 'once the Commissioner had changed the entire basis of the assessment in the revised assessment pursuant to an objection by the first respondent objection to the revised assessment in full as contemplated in section 81(5). It was further held that in the absence of fraud, misdescription or non-disclosure relied upon, the Commissioner is precluded by the provisions of section 79(1), read with section 81(5) of the Act from raising the assessment against the first respondent'[13]

[28] The respondent is, based on the said principle, precluded by the provisions of section 79(1) from raising the second ground against the applicant.

[29] The applicant relies on section 6(f) (i) and (6) (I) of Promotion of Administrative Justice Act (PAJA) in seeking to review and setting aside the "decision" to raise the second ground.

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[13] Para [24]

[30] An administrative action is defined in section 1 of PAJA. The term means 'any decision taken, or failure to take a decision by

(a) an organ of state when

(i) exercising a power in terms of the Constitution or a provincial constitution,

(ii) exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect.'

[31] The respondent's inclusion of the second ground in the Rule 10 statement is not an administrative action as defined in section 1 of PAJA. The inclusion of the second ground is not a "decision" as defined in PAJA.

[32] The respondent is obliged in terms of Rule 10(3) of the Tax Court Rules to deliver to the taxpayer a statement of grounds of assessment setting out a clear an concise statement of the grounds upon which the taxpayer's objection is disallowed and to state facts and legal ground upon which the Commissioner relies for such disallowance in Rule 10 statement.

[33] In my view, the respondent's "action" is not an administrative action as defined but a legal requirement obligating the respondent to do. PAJA is thus, not applicable.

[34] The constitutional principle of legality requires the public power to be exercised in accordance with the law. Considering all evidence before me herein, I am of the view that the inclusion of the second grounds in the Rule 10 statement outside the powers given to the respondent in terms of the relevant statutory provisions is contrary to the law and the principle of legality.

[35] It is trite that costs follow the event. The applicant succeeds and is entitled to his costs.

I, thus make the following order.

1. **The Respondent's second ground of assessment raised and relied on in Rule 10 statement dated 2 December 2011 is hereby set aside on the basis being in conflict with the Constitutional principle of legality.**

2. The Respondent is ordered to pay the applicant costs of this application which includes the costs of two counsel.

A.M.L. Phatudi

Judge of the High Court

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